No. 11666

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

SAM ORMONT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S OPENING BRIEF.

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To the Honorable Ninth Circuit Court of Appeals of the United States of America:

This is an appeal from the District Court of the United States in and for the Southern District of California, Central Division, on a conviction of the appellant and a judgment of the Court thereon, under Count I of a four-count indictment. Count I charges appellant with attempting to defeat and evade a large part of the income tax due and owing from him to the United States of America for the calendar year 1944.

Jurisdiction.

The appellant and one PHILLIP HIMMELFARB were jointly indicted on January 22, 1947, by the Grand Jury of the United States District Court in and for the Southern District of California, Central Division, and charged with four counts under Section 145(b) I. R. C.; 26 U. S. C. 145(b). The first count charges that on or about the

15th day of March, 1945, in the Southern District of California and within the jurisdiction of said Court, defendants did wilfully, knowingly, unlawfully and feloniously attempt to defeat and evade a large part of the income tax due and owing by SAM ORMONT to the United States of America for the calendar year 1944; (1) *"by* preparing and causing to be prepared and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income *and victory tax* return wherein they stated that his net income for said calendar year was the sum of $12,174.57", and the tax thereon $3,626.58, whereas it was alleged his net income for said calendar year was $36,982.52 for income tax purposes, and that the income tax thereon was $18,143.12; and (2) *"by* concealing and attempting to conceal from the said Collector and any and all proper officers of the United States the true and correct gross and net incomes received by him during the said calendar year *and* the sources thereof" [R. Vol. I, pp. 2-3].

Count II was in practically the same language as Count I, except that it charged the defendants with making and filing a false return for 1944 of the income of defendant PHILLIP HIMMELFARB [R. Vol. I, pp. 3-4].

Count III was a similar charge against SAM ORMONT only for income tax for the year 1943 [R. Vol. I, pp. 4-5].

Count IV was a similar charge against SAM ORMONT only for alleged income for the year 1942 [R. Vol. I, pp. 5-6].

Jurisdiction of said District Court was based upon Title 28, Section 41(2), U. S. C. A. (Judicial Code, Section 24) and Section 145(b) I. R. C.; 26 U. S. C. 145(b).

The jury returned the verdict of guilty on Count I as to appellant, and judgment was entered June 16, 1947 [R. Vol. I, p. 139]. Notice of appeal to this Court was filed June 24, 1947 [R. Vol. I, p. 207].

This Court has jurisdiction of the appeal under Section 128 of the Judicial Code (28 U. S. C. A. 225).

Statement of Case, Presenting the Questions Involved and the Manner in Which They Are Raised.

1. Motion to Dismiss Indictment.

On the 3rd day of February, 1947, the appellant duly filed a motion to dismiss said indictment and each separate count thereof [R. Vol. I, pp. 24-41], specifying as to Count I that the same does not state facts sufficient to constitute a crime or offense on the part of said defendant Sam Ormont, and further specifically pointing out twenty separate grounds, wherein said Count I was insufficient, summarizing as follows: that it was *not alleged that any part* of the alleged income for 1944 *remained unpaid* or was unpaid at the time the indictment was rendered, nor what sums had been paid, nor what portion, if any was unpaid; that it did not appear how defendant Sam Ormont could defeat his income tax by filing a "fraudulent victory tax return" (there being no such tax); that it did not show the "gross income" of the defendant Sam Ormont for said year; that it did not show the basis for the Government's figure of $36,982.52 alleged to be net income, nor what portion of the alleged $18,143.12 tax was "victory tax", what portion was "normal tax", and what portion was "surtax"; that it did not appear who were the proper officers of the United States from whom defendants attempted to conceal the income of defendant Sam

ORMONT, nor how this defendant concealed the "sources" of income, nor how the concealment of "the sources" violated Section 145(b) I. R. C. or constituted attempted evasion of income tax; that two offenses were set forth in said Count I and not separately stated, in that a felony of attempting to defeat and evade income tax, under subdivision (b) of Section 145, *supra,* was joined with a misdemeanor, namely, concealing sources of income, under subdivision (a) of Section 145, *supra.*

Similar specifications were made as to each of the Counts II, III and IV.

2. MOTION FOR BILL OF PARTICULARS.

At the time of filing the motion to dismiss, this defendant SAM ORMONT also filed a motion for a bill of particulars [R. Vol. I, pp. 57-71], and demanded facts and figures showing (a) the basis of the figure $36,982.52 alleged in Count I as net income, and an itemization of the items used by plaintiff in determining defendant SAM ORMONT's net income to be said sum, and an itemization of the sources from which such figures were derived, what part thereof constituted net income for "normal tax", what part was "surtax net income", and what part was "victory tax net income"; (b) the "gross income"; (c) the manner of calculating all of said taxes and the basis for the alleged income tax of $18,143.12 under Count I, showing all credits and deductions allowed in such calculations; (d) a statement of dates and amounts of payments made by the defendant SAM ORMONT on account of his income tax for that year; and (e) a statement of the portion, *if any,* of the $18,143.52 *which was unpaid.*

Similar particulars were demanded as to Counts II, III and IV of the indictment.

March 12, 1947, Judge Wm. C. Mathes of said District Court made an order denying said motion to dismiss, and denying practically all of said motion for a bill of particulars [R. Vol. I, pp. 74-76]. These rulings are assigned as errors No. 1 and No. 2 on the appeal [R. Vol. IV, pp. 1636-1637].

3. Motion for Continuance and Bill of Particulars.

Thereafter the defendant Sam Ormont entered a plea of not guilty to each and every count, and the case was called for trial on May 21, 1947, at 10 o'clock A. M., before the Honorable Peirson M. Hall, District Judge, at which time this appellant's counsel objected to the case proceeding, on the ground that neither the indictment nor the bill of particulars which was furnished disclosed the *basis* of the figures or items which the Government claimed were omitted from the income and not accounted for, nor from whence such items were derived, and that the defendant Sam Ormont could not prepare for a defense without knowing those items and would necessarily be taken by surprise, and asked for a continuance of the trial until such information was furnished [R. Vol. I, pp. 238-239]; and said motion was on the further ground that the indictment, together with the bill of particulars, did not state a public offense [R. Vol. I, pp. 241-242]. The Court denied the motions on the ground that they had been passed on by another judge and had become the law of the case [R. Vol. I, p. 239].

4. Once in Jeopardy.

A jury of twelve and one alternate were duly impaneled and sworn [R. Vol. I, p. 242]. Thereupon and on May 22, 1947, at 10 o'clock A. M., Mr. William Katz, attorney for defendant Phillip Himmelfarb only, specifically and in behalf of said defendant only made a motion to withdraw a juror and declare a mistrial, based upon the fact that during the impanelment of the jury Mr. Strong, Deputy United States Attorney, had referred to another case as pending against the defendants. Without the consent of this appellant or his counsel, the Court granted said motion and discharged the jury [R. Vol. I, p. 260]. Thereupon appellant's counsel made a motion to dismiss the indictment and permit him to enter a plea "once in jeopardy", based upon the record in this case showing the impanelment, swearing of the jury and discharge thereof *without his consent.* The motion was denied [R. Vol. I, pp. 302-304]. Thereupon appellant's counsel made a motion for immunity from prosecution on the ground that appellant had been subpoenaed and compelled to testify before the Grand Jury in connection with matters which necessarily would be involved in this indictment, including questions of invoices, profits and the like, without being advised of his constitutional rights [R. Vol. I, pp. 306-307]. Thereupon appellant's counsel made a motion to suppress all evidence pertaining to matters regarding meat, prices of meat, sales of meat, invoices and the like, which motion was likewise denied [R. Vol. I, pp. 310-311].

A second jury was thereupon duly impaneled and sworn [R. Vol. I, p. 312]. When the first witness was sworn for the Government and Government's Exhibits Nos. 1,

2, 3, 4, 5 and 6 were marked for identification and offered in evidence, appellant's counsel *objected to the introduction of any evidence* on the ground that the indictment, coupled with the bill of particulars, did not sufficiently allege a public offense, incorporating as grounds thus set forth in the original motion to dismiss and in the original motion for a bill of particulars, and specifically objected to the introduction of said exhibits, and particularly Exhibit No. 3, being a copy of the income return of appellant for 1944, on the ground of *variance* between said exhibit and the charge in Count I of the indictment, in that the charge in the indictment as to the *manner* in which the alleged crime was committed alleged the making and filing of an "income *and victory tax return*", whereas Exhibit No. 3 was simply an income return and not an income and victory tax return. The objection was overruled [R. Vol. I, pp. 320-330].

The Government accountant J. Bryant Eustice was sworn. Appellant's counsel interposed a running objection to all evidence by this witness [R. Vol. II, p. 550]. All objections and motions in this statement referred to will be specifically set forth in the specifications of error relied upon. This witness, over repeated objections, was permitted to testify from certain compilations that had been made partly by him and partly by others, regarding books and records and documents *which were not in evidence and were never produced in Court;* from certain bank records, checks and the like; and from a purported list of bonds prepared by another party, without the original bonds or any original evidence being produced, and was allowed to give his assumptions, conjectures and opinions therefrom as to alleged income of appellant which the witness *arbitrarily* labeled as "unexplained" and un-

reported income [R. Vol. IV, p. 1370], covering the years 1942, 1943 and 1944, and in so doing used the said list of bonds which he admitted showed on its face that the most of them were in two names and not merely in the name of appellant. Yet he charged all said bonds to the appellant, as to any that he, the witness, could not specifically trace the funds that purchased them, he calculated them as unreported income and by this means arbitrarily testified that appellant had such unreported income [R. Vol. II, pp. 507-551]. Government's Exhibit No. 6 was a joint venture information return by the defendants showing a gross revenue from joint venture for the fiscal year period beginning May 1, 1944, and ending April 30, 1945, in the sum of $71,388.84, with no deductions and showing an equal division thereof between the two defendants for said fiscal year [R. Vol. II, p. 853]. As to the alleged unreported income for 1944, this witness arbitrarily took from said Exhibit No. 6 $19,257.76 and charged the same against appellant as unreported 1944 income [R. Vol. II, p. 860]. The witness further charged as unreported 1944 income $3,000.00, which he failed to trace, and the sum of $1,000.00 embraced in the payment by appellant of a $4,000.00 loan, which $1,000.00 the witness said he could not trace. Then, there were some other small items making up the sum of $23,989.26 which the witness said was unreported income for 1944 [R. Vol. II, pp. 547, 548, 860]. As witness Eustice, on cross-examination, testified that he got the information concerning the bonds from Mr. Phoebus, appellant's counsel immediately moved to strike all of his testimony with respect to the bonds on the ground that it was hearsay [R. Vol. II, p. 549]. Witness Eustice used the same method of accounting in all three of the years [R. Vol.

II, p. 549]. The Court held that the case *was built up on an arbitrary accounting method* used by such witness [R. Vol. IV, p. 1370]. No other witness for the Government made any pretense of testifying as to appellant's income for 1944 that was alleged to be unreported, except Government witness ERNEST LINK, who had been the bookkeeper for appellant during many years and who had made out all of the income tax returns for those many years, which included all the years involved in this case, who testified that all of such returns were correct, with the exception that he claimed as to 1944 there had been a change made of approximately $3,000.00 in the cost of certain cattle [R. Vol. II, pp. 469-471], and he further testified that such $3,000.00 was actually paid as an additional payment for such cattle [R. Vol. II, pp. 472-473]. No other evidence of the *corpus delicti* was introduced as to the income for 1944 (Count I) nor was any other evidence of the *corpus delicti* introduced for 1942 and 1943, except that witness LINK identified some invoices [Exhibits No. 38 and No. 39], dated in 1942, which he said *he* had never entered on the records.

On June 3, 1947, while Court was in session and the jury present, a U. S. Marshal came into open court and within the view of the jury, served the defendant SAM ORMONT with a subpoena *duces tecum* to produce his books. After adjuornment and at the next calling of the court, appellant's counsel immediately called this incident to the attention of the court, moved to quash the subpoena and assigned the acts as misconduct [R. Vol. II, pp. 805-808; Vol. III, p. 890].

Mr. SAMUEL J. PHOEBUS, witness called for the Government, and who was up to the first day of July, 1945, a

Deputy Collector of Internal Revenue [R. Vol. III, p. 1018], over objection "that it is incompetent, irrelevant and immaterial; no proper foundation laid; not shown that the defendant in any discussion, if they had any, was forewarned of what their business was, or of his constitutional rights" [R. Vol. III, p. 1019], was permitted to testify to a conversation with the defendant on May 18, 1945, in which he asked the defendant if he had been required to pay other people amounts which he had not recorded on his books and to which the defendant first said "No", and when questioned further said "Yes" and that the witness said that he admitted that he had made such extra payments and that he then asked the defendant whether or not he had attempted to pass these overpayments over to his own customers and he said "No" he hadn't, that all of his income was recorded on his invoices and on his books and records, and that then the defendant asked "If a packer found himself in a situation where he had bought meat at 'A' prices, and the grader had graded it as 'B', if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they in that event come in and attempt to determine his income on the presumption that all such sales had been made on this basis?" The witness said he told him "No" that that was not the way they arrived at a taxpayer's income, and thereupon the witness suggested or made an appointment with the defendant for the 22nd day of May and suggested that he bring his individual income tax return with him and also prepare in the meantime a statement of his present net worth [R. Vol. III, pp. 1025-1026]. The witness was then asked to relate a conversation with the defendant as of May 23, 1945, to which the same ob-

jection was interposed and the objection was sustained [R. Vol. III, pp. 1027-1028]. Thereupon the witness was asked and over objection testified to a conversation with the defendant, occurring on May 24, 1945, in the Office of the Intelligence Unit on the 8th Floor of the Federal Building in Los Angeles, California. There were present Mr. Ormont, Mr. Bircher, Mr. Schlick and the witness. Mr. Schlick and the witness were deputy collectors and Mr. Bircher was a Special Agent of the Internal Revenue Bureau [R. Vol. III, pp. 1027-1029].

There was then some discussion between the Court and various counsel and particularly as to the sufficiency of the warning, and the Court said:

> "The Court: Well, I think probably it is sufficient. *It is awfully thin though.*" (Italics supplied.)

The Court thereupon overruled the objection and denied the motion [R. Vol. III, pp. 1033-1034].

Thereupon plaintiff's counsel stated:

> "Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?
>
> The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without repeating it." [R. Vol. III, p. 1034.]

Thereupon the witness was allowed to testify in detail as to said conversation and stated, in substance, that the defendant said that he continued to operate Acme Meat Company, as sole proprietor, until May 1, 1944, at which time he became associated with Mr. Himmelfarb, and

that he and Mr. HIMMELFARB had a verbal agreement to share the legtimate profits of the ACME MEAT COMPANY, the first $24,000.00 would be shared equally, all amounts over of legitimate net profit would go to ORMONT and that they had an agreement to share the collection of overcharges on a fifty-fifty basis, and those operations started May 1, 1944, and were discontinued May 18, 1945, and that for those years their profit had been $35,000 apiece; that Mr. ORMONT had pulled out of his pocket a little memo pad or book in which was written figures, showing that from May 1, 1944, until January 5, 1945, the amount was roughly $12,000.00, and from January 6, 1945, until April 30, 1945, the balance was what was remaining of the $35,000.00; that Mr. BIRCHER copies these figures on a piece of paper taken from said book; that Mr. ORMONT was asked if there was any way they could verify the amounts and he said that there wasn't any way, that no record had been kept except that they would write down the amount that they had accumulated to date and when they had accumulated an additional amount, they would throw away the old piece of paper and retain the current one. He stated that the collections were from customers of ACME MEAT COMPANY, but that this was no basis for verification as the prices fluctuated, there was no uniform charge per pound made for these overcharges and sometimes no charges were made to a customer [R. Vol. III, pp. 1035-1039]. (Thereafter the books with names of all customers were available to Government.) He further testified that the defendant said, in answer to question where the $35,000.00 went, $7,000.00 of it went into his bank account and the balance was reinvested in the business. He also said that he had a safety deposit box in which he had approximately $90,-

000.00 in Government bonds. He was asked about loans from other persons and he said there were $14,000.00 or $15,000.00 on the books as loans from DORA GOLDBERG, but that only $6,500.00 of these loans were legtimate [R. Vol. III, pp. 1045-1046].

On cross-examination, the witness admitted that Mr. ORMONT, at least on the 24th day of May, 1945, being the second conversation, told him he would give them anything they wanted in their investigation or examination and that he subsequently would render the books and records of the ACME MEAT COMPANY open for their investigation; likewise invoices, and they even took some invoices [R. Vol. III, pp. 1070-1071], and he further admitted that Mr. ORMONT told him that this matter of the $35,000 item was an *entirely side issue from the* ACME MEAT COMPANY and that he and Mr. HIMMELFARB entered into a joint venture and that this $35,000.00 defendant received was received through the joint venture and that they, Mr. ORMONT and Mr. HIMMELFARB, decided to report their joint venture income on a fiscal year basis and that they had filed Exhibit No. 6 on a fiscal year basis [R. Vol. III, pp. 1074-1075], and that the witness later found that the defendant had made his estimate consistent with his plan to file on a fiscal year basis *and paid all taxes thereon* [R. Vol. III, pp. 1078-1079] (witness EUSTICE admitted that under defendant's said manner of accounting and paying, he overpaid the Government approximately $3,000.00 more income tax than he would have had to pay under the Government's theory in this case) [R. Vol. II, p. 861].

Witness WILLIAM S. MAILIN was called and sworn in behalf of the plaintiff. He was a certified public ac-

countant employed by Mr. Mirman, an attorney who then represented Mr. Ormont and Mr. Himmelfarb jointly, and which said attorney employed said accountant to assist him in connection with his legal services to said defendants, and said accountant received all of his directions from said attorney [R. Vol. III, pp. 1093-1102]. He was permitted to testify concerning Government's Exhibit 42 and was allowed to testify as to what was listed thereon, over the objections that it was incompetent, irrelevant and immaterial, that the bonds and the contents of the box would be the best evidence, that it was a conclusion of the witness, and was privileged [R. Vol. III, p. 1105].

Exhibit 42 was admitted in evidence over the objections that it was incompetent, irrelevant, immaterial, not the best evidence, that no proper foundation was laid, that the bonds would be the best evidence, that the exhibit showed on its face that other people were interested in the bonds, and that there was no evidence that the bonds were Mr. Ormont's [R. Vol. III, pp. 1105-1106].

The Court permitted the witness to testify, over the objection that they were incompetent, irrelevant, immaterial and were privileged communications, that the witness sent Exhibits 51-A and 51-B, to Mr. Bircher, a Government agent, and that he believed he saw the signature placed on 51-A, but that he did not have any definite recollection as to the latter [R. Vol. III, pp. 1108-1113].

The Court admitted in evidence Exhibits 51-A and 51-B (all dated long after March, 1945), over the objection that there was no proper foundation laid, that they were incompetent, irrelevant and immaterial, that they

were privileged communications, not within the issues, that no *corpus delicti* had been established, that they were subsequent in time to the offense charged in the indictment, and that the witness was the agent of the attorney for Mr. ORMONT [R. Vol. III, pp. 1113-1116].

The witness was likewise allowed to testify that EXHIBIT 51-C *for Identification* was by him mailed to Mr. BIRCHER [R. Vol. III, p. 1117].

The Court admitted in evidence EXHIBIT 51-C, over the objection that it was incompetent, irrelevant, immaterial and privileged [R. Vol. III, p. 1119].

DONALD BIRCHER, special agent of the Bureau of Internal Revenue, was called as a Government witness and permitted to testify concerning one of the conversations to which the witness PHOEBUS had testified over the objection heretofore shown (which conversation was on May 24, 1945, in Room 844, Post Office Building, Los Angeles). The witness testified that he told Mr. ORMONT that he had a right to an attorney and that he was not required to give testimony, and that any statements he made or documents he produced *at that interview* might be used in court against him *in some manner* at some future time; that the defendant asked the witness specifically whether any statements he made might become knowledge available to certain other Government agencies, and was told by Mr. BIRCHER that normally any information given the Internal Revenue Department *would be held in confidence* by that department, but if a criminal trial should follow, such information *might be disclosed at any such trial.* Before making any statement at said conference, the *defendant* specifically asked if anything he might

say would be kept in confidence by those present and would not be divulged to any other department of the Government [R. Vol. III, pp. 1172-1173].

Witness BIRCHER admitted that the defendant did tell them that neither he nor defendant HIMMELFARB ever asked any customer for anything extra, that in many instances customers didn't give them anything extra, and that many of the amounts paid by the customers were paid at a time when such customers were not buying anything from them and on different dates than those on which any purchases had been made [R. Vol. III, pp. 1179-1180], and further told them that these contributions or gifts were a "side venture" of the two defendants and not treated as a part of the ACME MEAT COMPANY business [R. Vol. III, pp. 1185, 1186 and 1188].

The defendant also told the Government agents that in purchasing bonds he had in part used funds that he had accumulated in prior years from savings [R. Vol. III, p. 1191]. Witness EUSTICE admitted he was told the same thing by the defendant, but he gave no credit therefor.

At the close of the Government's evidence, appellant's counsel moved for an acquittal on each and every count of the indictment, on the ground that the *corpus delicti* had not been established and that there was insufficient evidence to warrant a conviction. The evidence was hearsay and incompetent [R. Vol. III, pp. 1252-54]. The motion was granted as to Count II and denied as to Counts I, III and IV [R. Vol. III, p. 1262] (Note: At the close of the entire evidence, the Court reversed his ruling and granted appellant's motion to acquit this appellant as to Counts III and IV, being for the years 1942 and 1943 [R. Vol. IV, p. 1367].)

Thereupon a great number of reputable witnesses testified as to the good character of the appellant [R. Vol. IV, pp. 1333-1347].

Defendant testified as to a great number of the checks introduced in evidence as having been used in the purchase of bonds in 1942 and 1943, and also testified that he had considerable cash that he likewise used, and explained most all of the items charged by expert EUSTICE as unexplained income and showed exactly what funds were used and where they came from [R. Vol. IV, pp. 1297-1329].

At the close of all the evidence, appellant's counsel renewed a motion for acquittal as to Counts I, III and IV, and the Court granted said motion as to Counts III and IV, stating on page 1370 that the whole case as to those counts was built up by an arbitrary accounting method used by the Government agent (1942 and 1943) and denied it as to Count I [R. Vol. IV, p. 1374].

Thereupon counsel for appellant moved to strike all the testimony of witness EUSTICE, with respect to the years 1942 and 1943, which motion was denied [R. Vol. IB, p. 1374]. Thereupon a similar motion was made as to the testimony of witness LINK and was likewise denied [R. Vol. IV, p. 1374].

Thereupon the case was argued and submitted to the jury on Count I only as to appellant and he was found guilty thereon and judgment was accordingly entered, from which this appeal is prosecuted.

Before judgment was pronounced, appellant's counsel made an oral motion for acquittal and a motion for a new trial, notwithstanding the verdict embracing, by reference, all the grounds set forth in the motion to dismiss

the indictment and the grounds embraced in the motion for a bill of particulars and the grounds embraced in the motion for acquittal presented at the end of plaintiff's evidence and the grounds embraced in the motion for acquittal at the close of all evidence and on the ground of error in the Court in denying the motion to strike the testimony of witness EUSTICE as to the years 1942 and 1943, which motions were denied [R. Vol. IV, pp. 1609-1610].

Questions Involved and Raised by This Appeal.

1. Did the Court err in denying appellant's motion to enter a plea of "once in jeopardy"?

2. Did the Court err in denying the written motion to dismiss the indictment?

3. Did the Court err in denying appellant's motion for a bill of particulars?

4. Did the Court err in denying appellant's motion for a continuance at the outset of the trial and for an order requiring plaintiff to supply a further bill of particulars?

5. Did the Court err in denying appellant's motion for immunity at the outset of the trial?

6. Did the Court err in denying appellant's motion to suppress evidence?

7. Did the Court err in overruling appellant's objection to Government's Exhibit No. 3 and admitting the same in evidence?

8. Did the Court err in admitting the evidence of Government accountant J. BRYANT EUSTICE over repeated objections?

9. Did the Court err in denying appellant's motion to strike the testimony of witness EUSTICE pertaining to the bonds?

10. Did the Court err in striking the testimony of Government witness ERNEST LINK over repeated objections?

11. Was it prejudicial misconduct of the Marshal to serve the subjoena on the defendant in open Court in the presence of the jury?

12. Did the Court err in admitting the evidence of Deputy Collector SAMUEL J. PHOEBUS without a proper foundation being laid and over repeated objections?

13. Did the Court err in denying appellant's motion to strike the testimony of witness PHOEBUS?

14. Did the Court err in admitting the testimony of Government witness WILLIAM S. MAILIN over objections?

15. Did the Court err in admitting Government Exhibit No. 42 over objections?

16. Did the Court err in admitting Government Exhibits No. 51-A and No. 51-B over objections?

17. Was there ever competent proof of the *corpus delicti*?

18. Did the Court err in admitting the evidence of Special Agent DONALD BIRCHER over objections?

19. Did the Court err in denying appellant's motion for acquittal as to Counts I, III and IV made at the close of the Government's evidence?

20. Did the Court err in denying appellant's motion for an acquittal on Count I at the close of all evidence?

21. Did the Court err in denying appellant's motion to strike testimony of witness EUSTICE as to the years 1942 and 1943, after having acquitted the defendant as to those years, namely Counts III and IV?

22. Did the Court err in denying the motion of appellant to strike the testimony of witness LINK as to the years 1942 and 1943?

23. Did the Court err in refusing to instruct the jury to acquit the appellant?

24. Did the Court err in refusing to give appellant's requested instruction X-1?

25. Did the Court err in refusing to give appellant's requested instruction X-2?

26. Did the Court err in refusing to give appellant's requested instruction X-3?

27. Did the Court err in refusing to give appellant's requested instruction X-4?

28. Did the Court err in refusing to give appellant's requested instruction X-6?

29. Did the Court err in refusing to give appellant's requested instruction X-8?

30. Did the Court err in refusing to give appellant's requested instruction X-9?

31. Did the Court err in refusing to give appellant's second requested instruction also X-8?

32. Did the Court err in refusing to give appellant's requested instruction X-10?

33. Did the Court err in refusing to give appellant's requested instruction X-12?

34. Did the Court err in refusing to give appellant's requested instruction that all facts proven must not only be consistent with the theory of guilt, but inconsistent with the theory of innocence?

35. Did the Court err in failing to give any of the instructions requested by appellant for which no specific exception was taken?

36. Did the Court err in its charge to the jury?

37. Did the Court give the jury conflicting instructions?

38. Did the Court err in failing to instruct the jury on the Court's own motion to its right to find the defendant guilty of lesser offenses embraced within the charge in Count I?

39. Was it not the duty of the Court on its own motion to instruct the jury that they might find the defendant guilty under Count I of a misdemeanor under (a) of Section 145 I. R. C.?

40. Did the Court err in instructing the jury that there was no variance between Government's Exhibit No. 3 and Count I of the indictment and that they could disregard a portion of the allegations of said Count?

41. Did the Court err in instructing the jury that a taxpayer is required to pay his income taxes on all funds "earned" in the year in which the same was earned?

42. Did the Court err in submitting questions of law for the jury to determine?

43. Was it a question of law for the Court to determine as to the sufficiency of books or records to entitle a taxpayer to file a fiscal year return?

44. Did the Court err in instructing the jury that a taxpayer must keep both books and records?

45. Was the prosecuting attorney guilty of misconduct in his argument to the jury?

46. Did the Court err in denying appellant's motion for an acquittal, notwithstanding the verdict?

47. Did the Court err in denying appellant's motion for a new trial?

Specification by Number of Assigned Errors Relied Upon.

Specification of Error No. 1.

The trial court erred in denying appellant's written motion to dismiss the indictment, filed February 3, 1947, based upon the ground that Count I did not state a public offense; did not show any tax was due or unpaid; did not show what portion, if any, was unpaid; did not show the gross income; did not show how the filing of a victory tax return could defeat or evade the tax for 1944; did not show the basis for the alleged income claimed by the plaintiff nor what portion of the alleged income tax was victory tax, what portion was normal tax, what portion was surtax; nor who were "proper officers of the United States" from whom it was alleged information was concealed nor how defendant could be guilty of any offense by concealing or attempting to conceal "the sources" of income; that two separate offenses were set forth and not separately stated, a felony for attempting to defeat or evade under (b) of Section 145, I. R. C. joined with a misdemeanor under (a) of Section 145, I. R. C. [R. Vol. I, pp. 24-41, 74-76; Vol. IV, pp. 1627, 1637].

Specification of Error No. 2.

The Court erred in not granting the motion of appellant for a bill of particulars, which motion was filed February 3, 1947, and denied March 12, 1947, and demanded a bill of particulars as to the facts and figures showing the basis of the $36,982.52 alleged as net income and an itemization of the items, sums and figures used by plaintiff in determining said net income for the calendar year 1944 and a statement of the funds from which derived and the several amounts and various items forming the same and what portion of said sum was the income from the calculation of the normal tax, what portion for surtax and what portion for victory tax; facts and figures showing the basis, figures, credits and deductions in determining the alleged tax of $18,143.12, and showing what portion thereof was normal tax, what portion was surtax, what portion was victory tax and showing the dates and amounts of credits for payments on account thereof [R. Vol. I, pp. 57-60, 74-76; Vol. IV, pp. 1627, 1637].

Specification of Error No. 3.

The Court erred in denying appellant's motion for a continuance and for a further bill of particulars on May 21, 1947, based upon the grounds enumerated in the original motion for a bill of particulars and upon the ground that neither the indictment nor the bill of particulars which had been furnished disclosed the basis of the figures or items which the Government claims were omitted from the income, nor from whence they were obtained, and the defendant by reason thereof was unable to proceed and prepare for defense and was therefore not ready for trial and would be taken by surprise until such bill of particulars was supplied [R. Vol. I, pp. 238, 239, 240, 242].

Specification of Error No. 4.

The Court erred in denying appellant's motion to dismiss and enter a plea of "once in jeopardy" made May 23, 1947, on the record before the Court in this case, showing that a jury had been duly impaneled and sworn to try the defendant and then had been dismissed without his consent [R. Vol. I, pp. 302, 303; Vol. IV, pp. 1627, 1638].

Specification of Error No. 5.

The Court erred in denying appellant's motion for immunity and for a dismissal on the ground that appellant was subpoenaed and required to testify before the Grand Jury without being advised of his constitutional rights on matters involved in charges set forth in the indictment in this case [R. Vol. I, pp. 305-307; Vol. IV, pp. 1627, 1638].

Specification of Error No. 6.

The Court erred in denying appellant's motion to supress all evidence and grant defendant immunity based upon the ground that he had been subpoenaed and required to testify before the Grand Jury, without being first advised of his constitutional rights, on matters embraced within the charge in this case [R. Vol. I, pp. 310, 311; Vol. IV, pp. 1627, 1638-1639; Vol. I. pp. 141-146].

Specification of Error No. 7.

The Court erred in overruling appellant's objections and admitting Government Exhibits Nos. 1, 2, 3 and 4, which objections were as follows:

"Mr. Robnett: * * *

Now, your Honor, take up the offered exhibits. They are in for identification with numbers.

The Court: 1, 2, 3, 4, 5.

Mr. Robnett: Yes. Taking up No. 1, which appears to be an individual income tax return for 1942, for the calendar year, by Sam Ormont, I wish to object to the introduction of that as not being within the issues in the indictment and the plea of the defendant of not guilty, for the reason that the count it would be under—

The Court: Count 4.

Mr. Robnett: I will have no such objection, I see, as to that one.

My objections rather will be to exhibit for identification No. 3, which is the individual income tax return for the calendar year 1944 by Sam Ormont. I object to that on the ground that under the only count in the indictment, No. 1, that that would be applicable, if at all—it is not admissible because it is not within the charge in that count for this reason: This return, if your Honor will examine it, is a simple return of ordinary taxes and no Victory tax whatever, yet the charge in the indictment of what this defendant did was that he filed a false and fraudulent income and Victory tax."

[R. Vol. I, pp. 335-336; Court's Ruling, p. 339; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 8.

The Court erred in overruling appellant's objection to the introduction in evidence of Government Exhibits Nos. 38 and 39, or the introduction of any testimony in connection therewith by witness ERNEST LINK, which objection was as follows:

"Q. (By Mr. Strong): Now may I show you a group of invoices which are marked Government's

Exhibit 38 for identification and ask you if you ever saw those before.

Mr. Robnett: If the court please, in connection with these invoices I wish to make an objection that they are incompetent, irrelevant and immaterial, and should not be shown to the witness or any testimony admitted thereon. I have a matter that I would like to present to your Honor."

Thereupon the Court said:

"The Court: Do you have other exhibits of this nature which you wish to have marked for identification with this witness?

Mr. Strong: Just one more.

The Court: In other words, if you can get all the exhibits you are going to use in with this witness, maybe we can wrap all the objections up at one time.

Mr. Strong: Very well.

The Clerk: No. 39.

(The document referred to was marked Government's Exhibit No. 39 for identification.)"

Exhibits 38 and 39 are 1942 invoices of ACME MEAT COMPANY [R. Vol. I, pp. 398, 399, 416; Vol. IV, p. 1627].

SPECIFICATION OF ERROR No. 9.

The Court erred in overruling the objection to the question and overruling the motion to strike the answer of the witness ERNEST LINK, pertaining to invoices and list as follows:

"Q. (By Mr. Strong): Did you see Mr. Himmelfarb performing any work on the premises of the Acme Meat Company during 1944? A. Yes.

Q. And during 1945? A. Yes.

Q. What did you observe?

Mr. Katz: I object to that, if the Court please, as too indefinite; no foundation laid.

The Court: Overruled.

A. I saw Mr. Himmelfarb making out invoices to customers when they would come to the Acme Meat Company. He would then compute on the machine in the office the amount due by the customer; then he would make after that computation another computation on the machine, a multiplication of the weight of that carcass of beef, or whatever it may have been, and enter this figure which was, as a rule, a computation—

* * * * * * * * *

"The Witness: I saw him compute the weight of the bill with the figure 3, and enter the amount on a list which was kept in the drawer of that desk.

Q. (By Mr. Strong): What desk? A. Of the desk of the Acme Meat Company, in the office.

Mr. Robnett: I move to strike out the answer as to Mr. Ormont upon the ground that it is hearsay and the opinion of the witness, and is not binding upon Sam Ormont.

* * * * * * * * *

Mr. Robnett: It is incompetent, irrelevant and immaterial." [R. Vol. I, pp. 429, 430; Vol. IV, p. 1627.]

SPECIFICATION OF ERROR No. 10.

The Court erred in overruling the following objection to the following question asked of the witness:

"Q. Did you ever see Mr. Himmelfarb receive any sums of money in connection with the sale of meat, which he entered on those sheets you have described?

Mr. Katz: I object to that, as a conclusion of the witness; incompetent, irrelevant and immaterial; no foundation laid.

Mr. Robnett: It is incompetent, irrelevant and immaterial as to Mr. Ormont. There is no connection between Mr. Ormont and Mr. Himmelfarb shown here except as an employee."

See stipulation and objections by one defendant shall apply to both defendants [R. Vol. I, pp. 240-241].

The substance of the witness' testimony was that he saw the list of names of customers, amounts placed opposite those names, sometimes written in the handwriting of Mr. HIMMELFARB, sometimes in the handwriting of Mr. ORMONT; some were marked "paid" and crossed out, some left open and not crossed out [R. Vol. I, p. 434; Vol. IV, p. 1627].

SPECIFICATION OF ERROR No. 11.

The Court erred in overruling the objection to the following question:

"Q. Did you record any of those amounts on those sheets into the records and books of the Acme Meat Company?

Mr. Katz: Objected to as to the defendant Himmelfarb. It is incompetent, irrelevant and immaterial. The books and records are the best evidence.

Mr. Strong: We don't have them.

"Mr. Robnett: We join in the objection."

The witness testified he did not record any of the amounts from said list on the books of the ACME MEAT COMPANY [R. Vol. I, p. 435; Vol. IV, p. 1627].

SPECIFICATION OF ERROR NO. 12.

The Court erred in overruling the objection to the following question:

> "Q. (By Mr. Strong): Mr. Witness, will you state from your knowledge of the books and records of the Acme Meat Company how the profits were distributed for the year 1944?
>
> Mr. Robnett: That is objected to as incompetent, irrelevant and immaterial, and his conclusion, and assuming something not in evidence, namely, that there were profits.
>
> Mr. Katz: I will add to that, if the Court please, that the books and records are the best evidence."

The witness stated that to the best of his knowledge he credited the entire profits to the account of SAM ORMONT for the entire year of 1944 [R. Vol. I, pp. 435, 436; Vol. IV, p. 1627].

SPECIFICATION OF ERROR NO. 13.

The Court erred in overruling the following objections to the following question regarding a conversation between the witness and Mr. Ormont:

> "Q. (By Mr. Strong): Will you state when this happened and who was present? A. It happened at the office of the Acme Meat Company in 19—I don't really recollect whether it was at the end or in the beginning of 1945.
>
> * * * * * * * * *
>
> Q. Will you state what Mr. Ormont said to you?
>
> * * * * * * * * *
>
> Mr. Robnett: I am going to object to it for Mr. Ormont on the ground it is after 1944 and is there-

fore incompetent, irrelevant and immaterial, doesn't go to prove any income for 1944 by either defendant."

The witness answered as follows:

"The Witness: Mr. Ormont told me that it was impossible to carry Mr. Phillip Himmelfarb on the books of the Acme Meat Company as a partner although he was a partner because that would spoil some of the subsidy payments and therefore I should list him as an employee, and that the profit was to be distributed to both accounts at certain periods."

[R. Vol. I, p. 439; Vol. IV, p. 1627.]

Specification of Error No. 14.

The prosecuting attorney was guilty of misconduct during the examination of witness Ernest Link, in repeatedly eliciting from said witness prejudicial statements, after motions to strike had been made and granted, which statements were to the effect that appellant was doing a shady business and for that reason the witness did not want to continue to work for him; and the Court was guilty of misconduct in failing to promptly grant the motions to strike and in failing to instruct the prosecuting attorney to desist from further pursuing said questions and discussion between the Court and prosecuting attorney [R. Vol. I, pp. 441-446].

Specification of Error No. 15.

The prosecuting attorney was guilty of misconduct in the redirect examination of Government witness Ernest Link, wherein the witness had made an explanation of certain checks in payment of differences on the purchase of cattle and changes which the witness had made on the records and which the defendant had made on

the original bills, so as to avoid the loss of the subsidy payments, and motion was immediately made to strike the answer and thereupon the following transpired:

"Mr. Strong: It proves that the records are false.

The Court: Government counsel's statement to the jury will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel." [R. Vol. II, p. 504.]

Specification of Error No. 16.

The Court erred in denying the motion to strike the answer of the witness J. Bryant Eustice as to his examination of books and records of the Acme Meat Company in making his investigation, as follows:

"Q. (By Mr. Strong): In addition to the exhibits that you have examined, did you in connection with your investigation into the income tax return of the defendant Sam Ormont for the years 1942, 1943 and 1944, and the defendant Phillip Himmelfarb for the year 1944, examine any other books or records? A. I examined the books and records of the Acme Meat Company.

"Mr. Katz: I object to that, if the Court please, and move to strike it, in so far as the defendant Himmelfarb is concerned, as there is no foundation laid for the testimony with respect to the examination of the books of the Acme Meat Company." [R. Vol. II, pp. 517, 518; Vol. IV, p. 1627.]

The witness testified that he examined the books of the Acme Meat Company for the years '42, '43 and '44; did not examine their records and check books and deposit slips, didn't consider that necessary, examined cancelled

checks, withdrawals, as recorded on books and records of the capital account and two personal accounts of ORMONT; also loans shown on books; made a transcript of *certain accounts* from records which constitutes part of his work sheet, that these work papers are in connection with the examination of the books of the ACME MEAT COMPANY *and other information* and that it was necessary for the witness to refer to them to refresh his memory in order to give testimony. His said working papers, as to defendant ORMONT, were marked Government's Exhibit 40 *for identification.* All this witness' testimony was based upon his said work papers which, in turn, were so based upon hearsay, evidence, books *which were not in evidence nor in Court,* and other extraneous matter.

SPECIFICATION OF ERROR No. 17.

The Court erred in denying defendant's motion to strike the testimony of Government's witness J. BRYANT EUSTICE, as to his conclusion of unreported income of appellant for 1942, which motion was as follows:

> "Mr. Robnett: If the Court please, I move to strike out all the testimony the witness has given in this connection upon the ground that it is partially based upon hearsay, but most of it is a mere assumption and conclusion of the witness. He has used, for instance, one item he testified to which showed that there was a $10,000 repayment of a loan he previously made. That is not income. Your Honor, of course, knows that in many of the items he has testified to here, he said they were unexplained, so far as he was concerned, and it is purely a conclusion of the witness, and is not the kind of evidence to introduce before a jury to try to convict a man for evading income tax.

* * * * * * * * *

"Mr. Robnett: Other than that, there is no foundation.

* * * * * * * * *

"Mr. Robnett: No proper foundation has been laid for any of it by this witness. Further than that, there is no showing that as to all of these things where he was getting his information from, and he is testifying here today concerning opinions. They may have been opinions, as he admitted as to the bonds, obtained from someone else. It is hearsay. There is not anything authentic about them. I never heard him testify he made all of that report.

* * * * * * * * *

"Mr. Robnett: I don't believe they have laid any foundation that this report he has before him was made by him from things he did examine." [R. Vol. II, pp. 531, 532; Vol. IV, p. 1627.]

The Court admitted that evidence from books which were not in evidence, nor in court, was "the rankest kind of hearsay" [R. Vol. II, p. 600], yet he permitted it throughout the case.

31 Corpus Juris, Sec. 940;

Hall v. Aetna Life Ins., 85 F. (2d) 447;

Miles v. Arena Co., 23 Cal. App. (2d) 680, at 685.

Specification of Error No. 18.

The Court erred in denying appellant's motion to strike testimony of witness Eustice as to bonds, the witness having testified that in 1943 defendant purchased U. S. Government bonds of $51,475.00, and then stated:

"Of these bonds he purchased by checks drawn on his personal bank accounts $32,390.24, and by

checks drawn on his business bank account, that is, Acme Meat Company, $5000.

"It was the total of those two items, that is, from known sources, $37,390.24. The difference between that and the actual bonds purchased was $14,084.76, which could not be traced to any known sources and was not explained by the taxpayer where the source of the funds came from.

* * * * * * * * *

"The Witness: The undisclosed income, $14,084.76. There were a couple of more items.

* * * * * * * * *

The Court: Those bonds, the same situation is true there, you don't know whether he bought them or didn't buy them? You are taking some other agent's assumption in that?

The Witness: That is correct.

Mr. Robnett: May I move to strike that out, if the Court please, that whole testimony as to $14,000, on the ground it is hearsay." [R. Vol. II, pp. 539-540; Vol. IV, p. 1627.]

Specification of Error No. 19.

The Court erred in overruling the following objection to the following question asked of witness J. Bryant Eustice:

"Q. Now taking the year 1944, the income tax return of the defendant Sam Ormont for the calendar year 1944, what was the amount of dividends and interest reported by the taxpayer?

"Mr. Robnett: I object to this, if the Court please, and any evidence in connection with it, on the ground it is incompetent, irrelevant and immaterial, not within the issues of this case. This is not the

return that is alleged in the indictment, and it is at variance from the charges in the indictment. This is the one where your Honor will remember on the question that they have alleged that there was an income and victory tax return made and they have offered or proven no such return." [R. Vol. II, p. 543; Vol. IV, p. 1627.]

See objections under Error No. 14.

RUNNING OBJECTION.

The following also transpired:

"Mr. Robnett: May it be understood that my objection runs to all of this testimony pertaining to this?

The Court: Yes. That is right. It will be overruled without prejudice to a motion to renew a motion to strike. [R. Vol. II, p. 550.]

The witness testified that Mr. ORMONT'S return for 1944 was correct as to the item of dividends and interest. with the exception of $1.27. As to item 5, Income from Business, the witness said he had additional income of $817.42 to add, being an item of business expense deducted by taxpayer (this was interest paid to DORA GOLDBERG accounting for and income tax paid thereon by her. Exhibit FF) [R. Vol. IV, p. 1295]. That there was income not disclosed by the taxpayer, $23,989.26, $3,000 of which the witness said was funds he could not trace in the purchase of $5,750 in Government bonds in 1944, $1,000 unexplained and which witness charged as unreported income of an amount paid on a loan of $4,000; that the same method of accounting was used in 1944 that the witness used in his accounting of 1942 and 1943; that as to the bonds he got all of his information from

a schedule supplied by Mr. PHOEBUS; that the corrected amount of income as claimed by the witness for 1944 was $36,982.52 or $24,807.95 more than was reported and that the tax which the witness claimed should have been paid was $14,516.54, as against $3,626.58. The witness then testified concerning Government's Exhibit 42 (list of bonds), said that where he got his information as to the bonds was furnished by Mr. PHOEBUS [R. Vol. II, pp. 545-551]. $19,257.76 of such assumed unreported income the witness *arbitrarily* took from defendant's *fiscal* year Joint Venture return [R. Vol. II, pp. 860, 868].

SPECIFICATION OF ERROR NO. 20.

The Court erred in failing to grant appellant's motion to strike all the evidence of the witness pertaining to bonds and to sustain the running objection to all testimony pertaining to the income of 1944. After the witness had testified concerning $3,000.00 which he claimed as unreported income which was paid for bonds and he could not discover the sources of such $3,000.00 as to 1944 income—

> "Q. (By Mr. Strong): As to the bonds, where did you get the information? A. As to the bonds that the taxpayer had in his possession?
>
> Q. Yes. A. From the schedule supplied by Mr. Phoebus, that he had made up, or, I think in connection with another accountant, of the taxpayer.
>
> Q. I could not hear you, Mr. Eustice. A. The schedule of the bonds was given to me by Mr. Phoebus.
>
> * * * * * * * *
>
> Mr. Robnett: I move to strike all the evidence as to the bonds upon the grounds that it is hearsay from the witness.

Mr. Strong: We will connect it up.

The Court: The ruling on that will be reserved.

Q. (By Mr. Strong): What was the total amount of net income for income tax purposes that was reported by the defendant Sam Ormont in his his income tax return for the current year 1944?

Mr. Robnett: May it be understood that my objection runs to all of this testimony pertaining to this?

The Court: Yes. That is right. It will be overruled without prejudice to a motion to renew a motion to strike." [R. Vol. II, pp. 549-550; Vol. IV, p. 1627.]

SPECIFICATION OF ERROR NO. 21.

The Court erred in denying defendant's motion to strike the following answer of witness EUSTICE relative to the bonds in the joint name of Mr. ORMONT and Mrs. GOLDBERG, which he charged to Mr. ORMONT's income for 1944:

"Q. Which ones did you credit? A. Only amounts which were paid for from funds from unexplained sources.

Mr. Robnett: I move to strike the answer out, if the court please, as calling for a conclusion of the witness, as to which bonds they were and the way he identifies them as to how they were paid. There is no identification of the bonds at all. It is his conclusion as to whether they were paid for or how." [R. Vol. III, pp. 971-972; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 22.

The Court erred in overruling defendant's objection hereinafter set out to the question hereinafter set out, respecting Exhibit Y:

> "Q. And in your examination of the records of the Acme Meat Company, were those checks shown as being used to pay for bonds?
>
> "Mr. Robnett: I object to that, if the court please, as asking for an opinion of the witness and hearsay testimony as to what the books show, and the books are the best evidence as to what they show."

The witness answered: "No sir, they do not." [R. Vol. III, pp. 974-975; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 23.

The Court erred in overruling the following objection to the following question pertaining to Exhibit X and in the following rulings to the following questions:

> "Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?
>
> Mr. Robnett: I object to that on the ground that the books would be the best evidence, and it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and nothing to show that it even went to the Acme Meat Company or that they had anything to do with it.
>
> The Court: Let me see the exhibit.
>
> (The document referred to was passed to the court.)
>
> The Court: Your question is what?

The question referred to was read by the reporter, as follows:

'Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?')

The Court: The objection is not timely, counsel. You cross-examined the witness at length upon the records, books, documents and data of the Acme Meat Company and counsel now by that examination I think you have waived any right to the objection which you have made. The objection is overruled.

The Witness: The answer is no.

Q. (By Mr. Strong): Now showing you defendant's Exhibit V, which is a check dated January 8, 1943, in the sum of $5000, paid to the order of Sam Ormont, signed Sam Ormont—it is an Acme Meat Company check—do you know whether this check was used to pay for any of the bonds purchased by the defendant Sam Ormont? A. I do not know that it was; no sir.

Q. And again as to the books and records of the Acme Meat Company which you examined, did they show what that check was used for? A. No, sir. It just indicates that it was money drawn by S. Ormont.

Q. And showing you this document, which is Defendant's Exhibit O, a check dated 5/11/1942, issued by the Acme Meat Company for $206.11, signed by Sam Ormont, paid to Sam Ormont, do you know whether this check was used to pay for any bonds purchased by the defendant Sam Ormont during or at about that period? A. No, sir; I do not.

Q. As to the books of the Acme Meat Company, do they show that it was used in that way? A. No, sir.

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial.

The Court: As to his examination of them, you mean?

Mr. Strong: As to his examination of them.

Mr. Robnett: It is a conclusion of the witness and the books would be the best evidence. I never asked him, only from his notes as to what his notes showed as to certain things, your Honor. I don't believe it is proper for him to ask what the books show.

The Court: Counsel amended his question to say what his examination of the books showed.

Mr. Strong: That is what I meant all the time.

The Court: That is what you meant all the time?

Mr. Strong: Yes.

The Court: Whether or not he found them?

Mr. Strong: Yes, he of his own knowledge.

The Court: The objection is overruled.

Q. (By Mr. Strong): Do we have an answer?

A. No, sir.

The Court: The motion to strike will be denied.

Q. (By Mr. Strong): Now I show you Government's Exhibit S, which is a check of the Acme Meat Company dated 4/26, 1943, in the sum of $1332.27, payable to the order of S. Ormont, signed Acme Meat Company by Sam Ormont, and I ask you whether of your own knowledge you know whether this check was used to purchase any bonds by Sam Ormont or in the name of Sam Ormont. A. No, sir; I do not.

Mr. Robnett: Same objection.

The Court: Same ruling.

Q. (By Mr. Strong): Here is another check, Defendant's Exhibit AA, paid to Sam Ormont, $100, dated 1/22/43, signed Acme Meat Company, by Sam Ormont; and attached to it is a check dated 1/29/43, $100, paid to S. Ormont, signed Acme Meat Company by Sam Ormont. Do you know whether or not those checks were used to purchase any bonds in the name of Sam Ormont? A. No, sir; I do not know.

Q. And so far as your knowledge of the books and records of the Acme Meat Company, do they show that that was used for that purpose? A. No, sir; they do not." [R. Vol. III, pp. 975-978; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 24.

The Court erred in overruling the following objection to the testimony of witness SAMUEL J. PHOEBUS, occurring on May 18, 1945, and who was at the time a Deputy Collector:

"Q. (By Mr. Strong): Going back to May 15, 1945, the occasion on which you testified you spoke to Mr. Ormont, on the premises of the Acme Meat Company, with reference to Mr. Ormont's income, will you please state what you said to Mr. Ormont, and what Mr. Ormont said to you in that connection?

* * * * * * * *

Mr. Robnett: Will it be understood that my prior objection to similar questions has been made?

The Court: I think you had better state it for the record.

Mr. Robnett: I object upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; there has been no showing that this man advised the defendant Ormont what his purpose was there, or that anything he might state

could be used against him; that he had a constitutional right to refuse to answer; and no proper foundation.

* * * * * * * *

Mr. Robnett: And on the further ground that there has been no *corpus delicti* established as to the defendant Ormont." [R. Vol. III, pp. 1023, 1024; Vol. IV, pp. 1627, 1638.]

The substance of the testimony of the witness was that they asked him if he had been required to pay other people amounts which were not on the books to which he first said "no" and finally said "yes" and he admitted that he had made extra payments; in answer to the witness' questions as to whether or not he had attempted to pass these overpayments on to his own customers, he said "no", but asked whether or not if an inspector of meat graded as Class "B" meat he had paid Class "A" prices for, if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they come in and determine his income on the presumption that all sales had been so made and he was told "no" [R. Vol. III, pp. 1025-1026].

Specification of Error No. 25.

The Court erred in denying appellant's motion to strike the answer of witness Phoebus to the question regarding the conversation of May 24, 1945, with Mr. Ormont, Mr. Bircher, Mr. Schlick and the witness, who was a Deputy Collector, which motion and question are hereinafter set forth:

"Q. Was anything said on that occasion to Mr. Ormont regarding his rights to testify or not to testify? A. Yes, sir.

Q. By whom? A. By Mr. Bircher.

Q. Do you recall what was said? A. Yes, sir.

Q. Will you state what was said? A. Mr. Bircher first asked him if he wanted to have an attorney present.

* * * * * * * *

The Witness: I see. That was the first occasion when these announcements were made to Mr. Ormont.

He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

This is my best recollection of it, or the reply to your question.

* * * * * * * *

The Court: Now in response to the first question that he was *not* entitled to an attorney, what did Mr. Ormont say?

* * * * * * * *

The Witness: Mr. Ormont said he didn't think he needed an attorney to tell the truth, that the thing had been bothering him, worrying him, and he wanted to get it off his mind so that he could go around and look people in the face again. And he repeated that he didn't think he needed an attorney to tell the truth.

Mr. Robnett: If the Court please, move to strike out that answer on the ground that it is incompetent, irrelevant and immaterial. That portion of it where he said he didn't think he needed an attorney to tell the truth might be responsive, but all the rest of it I don't think is in answer to that question. I think it is incompetent. It is improper to go into it at this

time. There was no such warning that I think the law contemplates of his rights in this matter. And as to the fact that they might use it at the time against him, he said that Mr. Bircher said in connection with some other matter, some matter. He didn't tell him as to this particular one, if I understand his answer. I don't know what the other matter was, but that is the way I got the answer to the original question."

(There is some discussion between Court and counsel and counsel asked that the prior statement as to the warning be re-read and it was.)

"Mr. Robnett: Do you see what I mean, your Honor?

The Court: Yes, I do.

That is all that was said to him concerning his rights?

The Witness: I think, your Honor, before we launched into a discussion of Mr. Ormont's income tax liability, Mr. Bircher said, 'All right, then, we will go on and ask you questions and if you don't want to answer any of them just don't answer it, just say so and we will go on to the next question.'

The Court: That is all?

The Witness: Yes, sir.

Mr. Robnett: Now I urge the force of my objection, your Honor, that he wasn't warned that anything would be used against him. He is entitled to be warned as to that. Merely telling a man that he doesn't have to answer is one thing, and if you tell him if he does answer it will be used against him is another thing.

* * * * * * * *

The Court: Well, I think probably it is sufficient. It is awfully thin though.

* * * * * * * *

Q. (By Mr. Strong): Will you state what was said to Mr. Ormont and what Mr. Ormont said in reply in connection with his income for the year 1944 on the occasion to which you have just referred?

* * * * * * * *

Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?

The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without repeating it." [R. Vol. III, pp. 1029-1034; Vol. IV, pp. 1627, 1638.]

The substance of the witness' testimony was that in response to a question from Mr. BIRCHER, Mr. ORMONT stated he was sole proprietor of the ACME MEAT COMPANY to May 1, 1944, at which time he became associated with Mr. HIMMELFARB. They had an oral agreement to share the legitimate profits, the first $24,000.00 of net profits to be shared equally, all amounts over legitimate net profit to go to ORMONT; in addition, they had an agreement to share fifty-fifty the collections of overcharges from the operations of the ACME MEAT COMPANY. This agreement started May 1, 1944, and was discontinued May 18, 1945; that for those years their profit had been about $35,000.00 apiece. That Mr. ORMONT pulled out a little memo pad or book in which was written figures, showing that between May 1, 1944, until January 5, 1945, the

amount was, roughly, $12,000.00 and from January 6, 1945, to April 30, 1945, the balance was the remaining of the $35,000.00; that Mr. BIRCHER copied said page from said book [Exhibit 53] and the witness said there was no way for them to verify the amounts, that no record had been kept, except writing the accumulated amounts to a given date and then throw away the old paper and retain only the current one; that the prices charged people fluctuated, there was no uniform charge per pound made for these overcharges, and that sometimes no charges were made to a customer [R. Vol. III, pp. 1035-1039].

SPECIFICATION OF ERROR No. 26.

The Court erred in denying appellant's motion to strike the answer of the witness concerning the conversation on May 24, 1945, to which Error No. 28 refers:

> "Mr. Robnett: Just a minute. All of this 1945 the witness testified to is objected to as not within the issues in this case. We are only going into the 1944 investigation. It is improper to put in evidence here of any kind, and any other year not involved here. It is not charged in the indictment. The charge is as to his income in 1944, and previous years; therefore it is incompetent, irrelevant and immaterial, and the witness is giving a conclusion as to what some papers show, and not pure conversation.
>
> * * * * * * * *
>
> Mr. Robnett: This is not part of the conversation, it is not responsive to the question." [R. Vol. III, pp. 1036-1037; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 27.

The Court erred in overruling the following objection to the following question:

> "Q. You didn't go into the contents of the affidavit? A. The affidavit, the way I remember it, set forth the fact that—
>
> Mr. Robnett: I object to that, if the court please, on the ground that the affidavit would be the best evidence, and this is secondary evidence, incompetent, irrelevant and immaterial, asking for an opinion of the witness as to what it contained. They haven't shown but what they have copies." [R. Vol. III, p. 1046; Vol. IV, pp. 1627, 1638.]

The substance of the witness' testimony was that the affidavit set forth that appellant and Mr. Himmelfarb had been operating this joint venture and collecting overcharges from customers of the Acme Meat Company and set forth the amounts which appeared on that slip of paper, showing approximately $12,000.00 received from Ormont in 1944 and $23,000.00 in 1945, set forth that no records or books had been kept.

Specification of Error No. 28.

The Court erred in refusing to strike the answer of the witness Phoebus for the purpose of an objection, when the witness was asked to place markers in Government's Exhibit 40 for identification of the portions of said Exhibit which were prepared by the witness and upon which Eustice based his testimony, and the following occurred:

> "Mr. Strong: The witness Eustice, and you will find in those working papers red place markers. Will you turn to each of those pages and state whether those pages which have those markers were prepared by you? A. Shall I replace the markers?

Q. Yes, leave them there. May we have him put an X on there? That is what I suggested originally. They may get lost.

Yes, you can put an X on there. We have a lot of markers. You can put an X on there, and it won't come out. And put your initials on each of the pages.

* * * * * * * *

The Witness: Do you want me to state, as I mark my initials on it, the document?

Mr. Strong: Yes, please.

A. The capital account of Sam Ormont from January 5, 1931 through March 31, 1943. This I copied from the books of the Acme Meat Company, in their office. The entire page is not written by me, but merely the figures.

Q. Will you circle in red the part you wrote? A. I also copied the withdrawal account of Sam Ormont, described on the top of my work sheet as summary from March 6, 1937 until March 31, 1943.

Mr. Robnett: Just a minute, your Honor. I would like to move to strike out the answer for the purpose of objecting on the ground that this evidence is incompetent, irrelevant and immaterial, and there is no proper foundation laid for it.

* * * * * * * *

Mr. Robnett: That is true; but I figure that what he says, he copied, that he copied certain things of record, the records would be the best evidence. It is secondary, and secondly, if the records were obtained from the defendants—" [R. Vol. III, pp. 1048-1050; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 29.

The Court erred in overruling the following objection to any and all testimony offered by witness William S. Malin, who was an accountant employed by Mr. Mirman, who was then attorney for Mr. Ormont and Mr. Himmelfarb:

> "Q. Did you at any time during the month of May 1945 meet with the defendant Sam Ormont?
>
> Mr. Robnett: As to which, your Honor, I wish to interpose an objection, and the objection requires possibly a little evidence to sustain it. It is an objection on the ground that any facts or evidence this witness might testify to are privileged. I would like to have the privilege of asking a few questions of the witness before this question is ruled upon." [R. Vol. III, p. 1091; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 30.

The Court erred in overruling the following objection to the following question asked of William S. Malin:

> "Q. (By Mr. Strong): Was there any discussion at that time with Ormont as to his income?
>
> Mr. Robnett: I object to that, if the Court please, as privileged, incompetent, irrelevant and immaterial; because the other defendant was present would not change the rule, I don't believe, as to privilege." [R. Vol. III, p. 1099; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 31.

The Court erred in overruling the following objection to the following question projected to William S. Malin:

> "Q. What did you list on Government's Exhibit 42 for identification? A. I listed—
>
> Mr. Robnett: I object to this as incompetent, irrelevant and immaterial, that the bonds and the con-

tents of the box would be the best evidence, and it is a conclusion of the witness as to what is listed. Also it is privileged."

The witness testified that Exhibit 42 was a list of the bonds in that safe deposit box.

(NOTE: PHOEBUS had previously testified that the box was in the names of two persons [R. Vol. III, p. 1082] and EUSTICE had testified that the list showed that the bonds were in the names of two persons [R. Vol. II, p. 727].)

[R. Vol. III, p. 1105; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 32.

The Court erred in admitting Government's Exhibit 42 in evidence and overruling the following objection thereto:

"Mr. Strong: I offer Government's Exhibit 42 for identification in evidence.

Mr. Robnett: To which I object, if the Court please, on the ground it is incompetent, irrelevant and immaterial, not the best evidence, no proper foundation has been laid. The contents of the bonds themselves would be the best evidence. And this exhibit shows on its face that there are other people interested in those bonds that are listed there on that exhibit and there is no evidence in this case to show that they were all or any of them were Mr. Ormont's bonds."

Said Exhibit was a list of bonds in the names of Sarah Goldberg, Mrs. Sue Kosdon, Dora Goldberg and Sam Ormont [R. Vol. III, pp. 1105-1106; Vol. IV, pp. 1627, 1638].

Specification of Error No. 33.

The Court erred in overruling the following objection to the admission in evidence of Government's Exhibit 51:

"Mr. Robnett: Your Honor, do I understand there are two exhibits offered, 50 and 51?

The Court: Yes.

Mr. Robnett: As to 50, I object upon the ground that it is hearsay as to Mr. Ormont; incompetent, irrelevant and immaterial; a privileged communication; and as to 51, that that is a privileged communication, and we claim the privilege. And it is incompetent, irrelevant and immaterial, and further that as to 51, pages 1 and 2 are especially privileged, and probably the last page. These three pages are privileged as to Mr. Ormont, and I want to make a separate objection upon the ground of privilege as to each part of that exhibit on pages 1, 2, 3 and 4.

* * * * * * * *

Mr. Strong: Yes. I would like to have these marked 50-A, B, C, and D.

The Court: Very well.

* * * * * * * *

Mr. Strong: May I have the same thing done with 51, to make it 51-A, B, C and D?

The Court: So ordered.

* * * * * * * *

Mr. Katz: May it please the Court, in order that the objections heretofore interposed to the questions with respect to Exhibit 50 for identification, I would like to interpose them to 50-A, B, C and D as now constituted.

Mr. Robnett: The same would be true of our objections, your Honor.

The Court: It will be so understood. The objections are overruled." [R. Vol. III, pp. 1109, 1110, 1111, 1112; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 34.

The Court erred in overruling the objections to and admitting in evidence Exhibits 51-A and 51-B and in denying motions to strike same, as follows:

"Mr. Robnett: As to 51-A and 51-B, I object on the ground that they are confidential communications and are within the rule prohibiting their use because this witness was an agent for the attorney of Mr. Ormont at the time, and that in addition thereto they are subsequent to all charges in the indictment and do not tend to prove or disprove anything in the issues in the indictment, the indictment in this case being for the year 1944 and the years prior. These are taken long after in 1945.

* * * * * * * *

Mr. Katz: I now move to strike Exhibit 50 on the ground that there is no foundation laid for its admission, as well as on the grounds previously stated.

Mr. Robnett: I join in the objection and also make the same objection to 51-A and 51-B.

The Court: Overruled." [R. Vol. III, pp. 1114, 1116, 1117; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR NO. 35.

The Court erred in overruling the following objection to the following question:

"Mr. Katz: If the Court please, with respect to 50-A and 50-B, I interpose the objection that there is no foundation laid, incompetent, irrelevant and immaterial, that the matters set forth therein are embraced within the privilege communication rule, and not within the issues of the case, and no *corpus delicti* has yet been established, also subsequent in time to the offense included within the indictment as against the defendant Himmelfarb.

* * * * * * * *

Q. When were those statements prepared, 51-A and 51-B and 50-A and 50-B?

Mr. Robnett: I object to that on the ground it is incompetent, irrelevant and immaterial.

Mr. Katz: Same objection heretofore made, if the Court please, if I may make it that way without restating it." [R. Vol. III, pp. 1113, 1115; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 36.

The Court erred in admitting in evidence Exhibit 51-C and overruled the following objection:

"Q. (By Mr. Strong): I now show you Government's Exhibit 51-C for identification and ask you if you ever sent that to Mr. Bircher, ever mailed it to him."

This question had been previously asked and objected to and assigned herein as Error No. 36, to which objection reference is hereby made [R. Vol. III, p. 1117; Vol. IV, pp. 1627, 1638].

SPECIFICATION OF ERROR No. 37.

The Court erred in admitting in evidence Exhibit 51-C and overruling the following objection:

"Mr. Robnett: I want to make a further objection on behalf of Mr. Ormont as to 51-C on the ground that it is incompetent, irrelevant and immaterial, and this is a privileged communication which the witness received from Mr. Ormont through Mr. Ormont's attorney, and it is therefore a privilege." [R. Vol. III, p. 1119; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 38.

The Court erred in overruling the following objection to the following question and in denying the motion to strike the answer:

"Q. (By Mr. Strong): Showing you Government's Exhibit 51-A, which is the statement signed by Sam Ormont, where did you get the information which is contained on that document?

Mr. Robnett: I object, if the Court please, upon the ground that it is incompetent and immaterial and also privileged, where he got the information; and the exhibit speaks for itself.

* * * * * * * *

Mr. Robnett: I move to strike the answer, if the Court please, and also to strike the exhibit itself, 51-A, upon the ground that it is now shown that all of this information was obtained by this gentleman while he was employed by the attorney for Mr. Ormont, and as agent for that attorney, and it is, therefore, privileged, and was privileged, and it is improper to admit it at this time." [R. Vol. III, pp. 1119, 1120, 1121; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 39.

The Court erred in denying the following motion to strike the answer of the witness and the following objections to the following questions:

"Q. (By Mr. Strong): Where did you get the information which is inserted here: Miscellaneous Enterprises. Where did you get that information? A. From the attorney, Mr. Mirman.

Mr. Robnett: I move to strike the answer, if the Court please, upon the ground that it is not binding upon this defendant, and would be hearsay.

The Court: Overruled. Motion denied.

Mr. Katz: If the Court please, I interpose the objection, and move to strike upon the ground that it is a privileged communication. The signing of a document disclosing the information contained therein, does not waive the privilege of the source from which the information was obtained.

Mr. Robnett: I would like to join in that.

The Court: Motion denied.

Q. (By Mr. Strong): I show you this item here on the front page, item 12 on the return says, 'other income, state nature of income,' and then the words, 'miscellaneous income, $71,388.84.' Where did you get that information?

Mr. Robnett: Object to that as having been asked and answered.

Mr. Strong: No, that wasn't the same question, your Honor.

Mr. Robnett: He asked him about the item under miscellaneous income.

Mr. Strong: No, I asked about miscellaneous enterprises, which is another line on top.

Mr. Robnett: Same objection to this question as interposed to the other." [R. Vol. III, pp. 1126-1127; Vol. IV, pp. 1627, 1638.]

SPECIFICATION OF ERROR No. 40.

The Court erred in overruling the following objections to the following questions:

"Q. (By Mr. Strong): Mr. Witness, as to these sums that are shown here of 50 per cent, $35,694.42 to Sam Ormont, 50 per cent for $35,694.42 to Phillip Himmelfarb, did you see any records with reference to those sums?

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial, also that it is privileged.

The Court: The question calls for a yes or no answer, and in view of that the objection is overruled.

The Witness: Well, yes.

Q. (By Mr. Strong): Did you see regular books and records? A. No, sir.

Mr. Robnett: Object to that as asking for an opinion of the witness.

The Court: Objection sustained.

Q. (By Mr. Strong): What did you see? A. A slip of paper on which was written—

Mr. Robnett: I object to that, if the Court please, on the ground that it is privileged and incompetent, irrelevant and immaterial, also leading and suggestive.

The Court: There is no foundation laid as to when he saw it, who was present, and so forth.

Q. (By Mr. Strong): When did you see it?

Mr. Robnett: I object to that.

The Court: He said he saw a piece of paper.

Mr. Robnett: I know. I object to this question as immaterial." [R. Vol. III, pp. 1130-1131; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 41.

The Court erred in permitting the witness Donald Bircher to testify to the conversation of May 24, 1945, being the same conversation previously testified to by witness Phoebus, to which objections were made and specified as Error No. 25 and to whose testimony a motion to strike was made and appellant reserved a running objection to that line of testimony, all of which objections and motions are set forth under Specification of Error No. 25, to which reference is hereby made without further repetition. The substance of the testimony given by Mr.

Bircher was practically the same as that given by witness Phoebus.

That the witness prepared an affidavit which the defendant signed. That thereupon they all went down to the packing plant and while there, Mr. Ormont asked to see the affidavit he had signed at the office, which was handed to him, together with one prepared for Mr. Himmelfarb; said he wanted to compare them; he then started folding the two together and Mr. Bircher grabbed the affidavits and told the defendant, "Don't do that. You are trying to destroy Government property. Apparently that is what you have in mind. You better be careful. That is very serious. Give it a lot of thought before you do it." Mr. Ormont held firmly and finally twisted and crushed the paper and took it away and ran out the door to where they were slaughtering cattle and Mr. Bircher ran after him and asked him to give the affidavit to him and he said he couldn't. Mr. Bircher told him that he had better. They then walked back to the office and had further discussion and the witness said "We told him we would go into the matter further at a later date" [R. Vol. III, pp. 1135-1142, 1145-46; Vol. IV, pp. 1627, 1638-1642].

Specification of Error No. 42.

The Court erred in allowing the witness Bircher to testify to the contents of the alleged affidavit, being the same affidavit that witness Phoebus testified to and whose testimony was objected to, as hereinbefore set forth in Specification of Error No. 30 to which reference is hereby made.

The substance of the testimony of witness Bircher, as to the contents of the affidavit, was that Mr. Ormont had

received approximately $35,000.00 extra income not reported on his books and the portion which he had received in 1944, he had not reported on his 1944 income tax return [R. Vol. III, pp. 1147-1148; Vol. IV, pp. 1627, 1638].

Specification of Error No. 43.

The Court erred in permitting witness Bircher to testify concerning Exhibit 42 and concerning the safe deposit box and the making of a list of the contents thereof and as to the statements of Mr. Ormont on May 25, 1945, being the same incident testified to by Mr. Malin over objection and which is hereinbefore assigned as Error No. 31, wherein the objection is set out and to which reference is hereby made.

The substance of the witness' testimony was that Mr. Ormont opened the safe deposit box and the witness asked Mr. Malin to take out his work papers and copy in their presence so that they could watch him as each document was taken out of the box by either Mr. Ormont or by the witness and that Mr. Malin made a list as the bonds were taken out. Mr. Ormont stated he had purchased most of the bonds, although they were recorded in his name jointly with the name of his mother, Mrs. Dora Goldberg. He had purchased them mainly from funds from extra charges he had collected on the side which were not recorded in the books. Some of them he had purchased in earlier years with some of his savings. He noticed that one of the bonds was recorded in his name alone and not in the name of his mother and he jointly, and he asked whether it was possible for him to get it corrected so that it could be in their names jointly; although *it* was his funds, he wanted it in the two names. Said that Mr.

ORMONT came over to the witness and apologized repeatedly. This answer was struck out on motion and the witness was told by Mr. STRONG not to go into the apology at all, but notwithstanding that he again stated that Mr. ORMONT said he wished to apologize for his actions the day before in having taken the affidavit from me forcefully and doing away with it, *and asked what could be done to straighten out the situation.* The witness told him the thing to do was to produce the affidavit and defendant said he couldn't. The defendant told him, "Mr. Bircher, as proof of my patriotism, I want you to know that all this extra money I got on the side I put in war bonds" [R. Vol. III, pp. 1149-1152].

The Court also erred in denying the motion to strike said testimony where Mr. Robnett called the Court's attention to the transcript of the record and quoted certain testimony of Mr. BIRCHER with regard to what he told the defendant regarding the affidavit, and then made the following motion:

> "I now, at this time, move to strike all of the testimony of the witness Bircher, as to conversations and transactions that happened after that incident he just testified to, on the ground that thereafter anything that the defendant said or did was of necessity, said and done under threat, and not voluntary, because here he was under a threat, that he had better not do this; he was destroying Government property; it was very serious, and that they would go into that matter further at a later date. And I think it is a sufficient showing to show that the defendant thereafter would be under fear as to anything he might say or do. * * *
>
> * * * * * * * *

"That is my motion, to strike all of that evidence that follows that, the conversation, and all things that happened with regard to his showing them the bonds, letting them take a list of the bonds, and also as to any furnishing of books or records thereafter, on the ground that that was and still is a threat." [R. Vol. III, pp. 1156-1158.]

Specification of Error No. 44.

The Court erred in denying appellant's motion made at the close of plaintiff's case and the renewal thereof at the close of all the evidence to strike all the evidence of witness Eustice on the ground that it was admitted over objection, that it is incompetent, irrelevant and immaterial, based largely on hearsay testimony and part of it was hearsay and went in over repeated objection and a running objection thereto and was based upon matters that happened outside the hearing of defendant, conversations the witness had had with other persons, records that he obtained from elsewhere, information he had gotten from other agents and third parties, and that no proper foundation had been laid, and which motion, by renewal incorporated therein prior objections, motions to strike the evidence, including objections, at the outset of the trial against the admission of any evidence, the grounds set forth in the motion to dismiss the indictment and in the motion for a bill of particulars that there was a variance between Count I of the indictment and Exhibit 3 and that all evidence pertaining to the bonds and list of bonds and matters that happened subsequent to the conference on May 24, 1945, was obtained under threat [R. Vol. III, pp. 1234-1244; Motion renewed at close of all evidence, R. Vol. IV, pp. 1366-67].

Specification of Error No. 45.

The Court erred in denying appellant's motion at the close of plaintiff's evidence and the renewal thereof at the close of all evidence to strike the testimony of witness Phoebus with regard to the bonds and the bond list and all his oral testimony concerning the same and the funds with which they were purchased on all the grounds set forth in the motion to strike the testimony of witness Eustice, summarized in Error No. 47 [R. Vol. III, pp. 1233, 1243-4; Motion renewed at close of all evidence, R. Vol. IV, pp. 1366-67].

Specification of Error No. 46.

The Court erred in denying appellant's motion at the close of plaintiff's evidence to strike all of the testimony of witness Bircher with respect to the bonds [R. Vol. III, p. 1244; Vol. IV, pp. 1366, 1367].

Specification of Error No. 47.

The Court erred in denying appellant's motion at the close of plaintiff's evidence and the renewal thereof at the close of all evidence to strike the testimony of witness Eustice on pages 843-845 of the typewritten transcript [R. Vol. III, pp. 974-977] with regard to certain bonds, which evidence was admitted over the objection that the books were the best evidence, was asking for opinion of the witness, was incompetent, irrelevant and immaterial.

Said evidence in substance was that the witness was asked if certain checks were shown on the records of the Acme Meat Company as having been used to pay for bonds for which objection was interposed and was allowed to testify that they did not show and enumerated various acts and referred to Exhibits X, V, O, S, AA to which

testimony objections at that time were interposed on the ground that they were hearsay, books would be the best evidence, it is incompetent, irrelevant and immaterial, no foundation had been laid [R. Vol. III, pp. 1251-1252; Vol. IV, pp. 1366, 1367].

Specification of Error No. 48.

The Court erred in denying appellant's motion for an acquittal on all counts of the indictment made at the close of plaintiff's evidence on the ground of insufficiency of the evidence [R. Vol. III, pp. 1252, 1256-1257; Vol. IV, pp. 1627, 1640, point 18].

Specification of Error No. 49.

The Court erred in denying appellant's motion for acquittal on Count I at the close of all evidence on all the grounds stated in the motion for acquittal at the close of plaintiff's evidence and including the ground of "once in jeopardy", in response to which the Court said:

> "The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4.
>
> * * * * * * * *
>
> "I will grant the motion for a judgment of acquittal as to Counts 3 and 4, as to the defendant Sam Ormont; and the case will go to the jury as to the defendant Sam Ormont, on Count 1 only." [R. Vol. IV, pp. 1367, 1369, 1374.]

Specification of Error No. 50.

The Court erred in denying appellant's motion made immediately after the Court had acquitted the defendant Sam Ormont on Counts III and IV (income for 1942 and 1943), reading as follows:

> "Mr. Robnett: Your Honor, under those circumstances, I now move to strike all of the testimony and the evidence given by the witness Eustice, as to the years 1942 and 1943, upon the ground that it is incompetent, irrelevant and immaterial, and prejudicial, if it is allowed to remain in before the jury, as to 1944." [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22.]

Specification of Error No. 51.

The Court erred in denying the motion immediately following the above motion and based upon the same grounds to strike all the evidence of witness Link, pertaining to the years 1942 and 1943 [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22].

Specification of Error No. 52.

Prejudicial error was committed by the Government, causing a Deputy United States Marshal to come into open court, while court was in session, in the presence of the jury, and serve the defendant Ormont with a subpoena *duces tecum* to produce his books and it was assigned as prejudicial misconduct [R. Vol. II, pp. 805, 808]. After the counsel called the matter to the court's attention, they then made this motion [R. Vol. III, p. 890]. The court remarked that the Deputy Marshal was not only a lady, but a good looking lady. Hence the jury must have noticed her serve the defendant.

Specification of Error No. 53.

The U. S. Deputy District Attorney was guilty of prejudicial misconduct in his argument to the jury, in the following particulars which are misstatements of the evidence:

"* * * And you will remember the cross-examination, three or four days of it, testing every iota of statement that was made by Mr. Eustice, testing him right and left, trying Mr. Eustice, did he remember or didn't he remember, where did he get it, where didn't he get it, asking hypothetical questions, if this was the fact—*nothing in the record to show that it is the fact*—but if such-and-such is the fact then you subtracted that from this, and you added this to that, what would you have? * * * *There is nothing to show that they did exist, nothing to show that any of these supposition questions are based upon anything than what they purport to be,* if and assume.

"* * * That is all on suppositions, or assumptions—*nothing in the record to show that it happened.*

"You will remember that after all that questioning and all of these checks that we used to ask him, what about this check, what about that check, did you subtract this one and did you add this one, if you did that what would you have? You will remember I took all those checks and I took each one and I said to Mr. Eustice, I said, 'Now take this check, did you include that amount in the sum which you say is unreported income?' He said, 'No, sir.' (Italics supplied.) [R. Vol. IV, pp. 1456-1457.]

* * * * * * * *

"And we went down the line, and my recollection is that there wasn't a single check upon which he had

been cross-examined or questioned, *not a single check, that he included as part of the unreported income.*

"Well, if those checks aren't included as part of the unreported income, what have they to do with this case? You might just as well bring in my checks too and ask him if he deducted those sums what would he have. *It has nothing to do with this case, absolutely nothing.*

"Every single check—and you can examine these checks—some $6000 in this sum, piles of them, all marked by the defendant and all put before Mr. Eustice and cross-examined, if and maybe and assume, *but not a single one of those checks was taken as part of the unreported income.* And if that is true then there is nothing to worry about those checks, no reason to deduct those checks from the unreported income. *He didn't take them in. They had nothing to do with the figure which he says is shown to have been the additional sum of money* which was furnished by Mr. Ormont and *which was not reported.*

"And then we had this business of cross-examination of applications for war savings bonds. Any connection between the applications that were put up by defense counsel concerning which he questioned Mr. Eustice and any of the particular bonds that Mr. Eustice took in as income bought with unreported income? *No connection shown,* just as application.
* * *

"Checks, figures, $1322.27. 'Add up these figures,' I asked Mr. Eustice. 'Were any of those sums taken in by you as unreported income?' He said, 'No, sir.' It has nothing to do with this case at all. More checks—more checks. [R. Vol. IV, pp. 1458-1459.]

"I ask you if those aren't some of the extra pieces in the box. We are dealing with a jigsaw puzzle,

with certain evidence. I ask you to consider whether those aren't the extra pieces that have nothing to do with this case. *Very confusing, no doubt about it,* and if you don't separate them you will never get to building the jigsaw puzzle as it should be built. You will never get to the final picture. *You will have so many pieces that have nothing to do with it that you may give up.* But I say to you, ladies and gentlemen, that the evidence which shows what was the unreported income is so clear and convincing and completely undisputed, completely undisputed, that there isn't any doubt as to the unreported income and there isn't even any substantial doubt as to what the sum is.

"Now what did Mr. Eustice tell you specifically? The year 1944—I am only going to deal with 1944—he told you how much the original return reported, a sum which was shown as salary, some $4500. Mr. Eustice said that he found *about $27,000 more* than Mr. Ormont had earned and hadn't reported. *Rents shown, various other deductions and items shown, unreported. What was the difference?* The difference was between the amount reported, some $9,000, and the correct amount, some $36,000.

"I ask you, is that difference substantial? Is that a sum that one overlooks in his computations as you might small expenditures for hairpins or something? Is that something that one doesn't take into account or is that something that someone wilfully and deliberately conceals for the purpose of defeating and evading the payment of a substantial part of his tax?

"And as to these figures which are in the record—they might not be precise but your memory is much better than mine, I am sure—Mr. Eustice told you where he got those figures. He told you how he got

them. He told you what he based them on. And there isn't any contradiction as to the figures.

"Yes, there is an attempt to confuse, there is an attempt to drag something else in, but as to the figures as to which he testified, they are all in there. There were one or two items which *Mr. Eustice took in as income which might or might not be income, which might be repayment of a loan or something.* I don't remember what the items were, but I don't think that they exceeded $2000. I don't think they even reached $1000. But the difference between $1000 which he may have taken in which he shouldn't have—I don't say he did, but if he did—*the difference that and the $26,000 or $27,000 additional,* that is immaterial. *That is just a drop in the bucket.* That is another extra piece to take your attention off the main figure. (Italics supplied.) [R. Vol. III, p. 1460.]

"I submit to you, ladies and gentlemen, that in Mr. Eustice's testimony with reference to the computations of the amounts *shown on the books and records of the Acme Meat Company* and the amounts shown upon the bank records that are undenied and undisputed as of this amount, and *that every single one of those other items dragged in have absolutely nothing to do with this because Mr. Eustice did not take them in as part of the unreported income.*

"Now I am not going to take your time to point out and show you all these if questions and assuming questions—you remember them—this thing *went on for so long that after while it was perfectly clear as to what was going on and I think it is perfectly clear as to why it was going on. And that is another thing to consider,* as I told you, because this case deals with concealment of money, failure to report

money and an attempt to defeat and evade a tax. You take into account what goes on with reference to all disclosures and everything. Are you getting complete information, or have you got just the information that Mr. Eustice put in, *undenied, undisputed and corroborated?* I will show you how. (Italics supplied.)

"Mr. Link testified. * * * But the important thing is that he testified to, and the important thing is in this case because it deals with this attempt to defeat and evade, it deals with the state of mind of the defendant, it shows you his wilfulness, his deliberateness, his intent and his purpose, *is the fact that Mr. Ormont told Mr. Link to change certain figures on those books, raise the figures. That is falsifying his records.* (Italics supplied.)

* * * * * * * *

"And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books because, as he told you, he had never been given those invoices. And what did those invoices show, ladies and gentlemen? Those invoices showed on their face—and they are part of the exhibits; *you can examine them*—but they showed on their face that the money shown on them was paid, the date it was paid, and it had Mr. Ormont's signature *That is some more money that isn't on the books, some more money unreported,* some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont. (Italics supplied.) [R. Vol. IV, pp. 1461-1462.]

* * * * * * * *

"The exhibits prepared and signed by the defendant himself, the defendant Ormont, if you will examine them will, on their face, tell you the whole pic-

ture, even if Mr. Eustice were not giving testimony about them; if all you had were the exhibits 51 A, B, C and D; if all you had were the income tax return for 1944; if all you had was the income tax return which shows how much money was earned in that period; those documents alone tell you what the *additional income was.* (Italics supplied.) [R. Vol. IV, p. 1468.]

* * * * * * * *

"* * * But even in the return which he filed on *that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money.* * * * (Italics supplied.)

* * * * * * * *

"Any deductions? *You know, you have deductions when you earn money;* * * * (Italics supplied.) [R. Vol. IV, p. 1471.]

* * * * * * * *

"* * * They disclosed at that time what that money was, and, *if everything was above board, clean honest, and not a violation of law,* why didn't they put it on the return? Why did they have these hieroglyphics. Miscellaneous income, $71,000.00. No explanation; nothing. * * * (Italics supplied.) [R. Vol. IV, pp. 1473-1474.]

* * * * * * * *

"And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in 1943 out of the $12,000 he bought about $8000 worth of bonds. You remember that testimony, $8000 worth of bonds. That I assume is intended to show, or at least you are supposed to draw the inference from that, that the unreported income

which Mr. Eustice claims this man accumulated during that year wasn't really accumulated during that year because he bought $8000 worth of bonds.

"Take the $8000 and then look at this Schedule No. 42 which shows how many bonds were actually bought during that year and see if you don't find over $50,000 worth of bonds bought that year—$50,000 worth of bonds—some such sum. Just look at them. They are enumerated on the schedule and it is in evidence.

"What is $8000 off of that? It is $42,000. Well, let's assume he had $8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know. [R. Vol. IV, pp. 1476-1477.]

* * * * * * * *

"* * * And besides that Mr. Malin himself, with information *which he told you he got from the defendant Ormont,* prepared net worth statements too. * * * (Italics supplied.) [R. Vol. IV, p. 1478.]

* * * * * * * *

"* * * His Honor will tell you that if we do not prove the whole figure, if we prove substantially the figure, *if we prove a substantial amount of money, it is just as good as proving the whole figure.* In other words, you don't have to hold the government to proving precisely that sum of money which is stated in the indictment. Substantially that is enough. And the amount of money shown on that little slip of paper which I have shown you, which is Government's

Exhibit 53, as well as the amount of money which is shown upon these documents which were filed by Mr. Ormont and the accountant, *that is practically the same as the amount shown in the indictment under count 1.* So there isn't any problem as to any variance between the amount shown and the amount that we have established. * * * (Italics supplied.)

"* * * And if you just disregard all the irrelevancies, all of these red herrings—you know what a red herring is, it is something you draw in here to distract attention—*just forget all about these things that were dragged in and that have nothing to do with this case,* and what does this case consist of? * * * (Italics supplied.) [R. Vol. IV, pp. 1480-1481.]

* * * * * * * *

"* * * If you want to forget everything that Mr. Eustice said and if you just look at that fiscal year return, which shows $71,000 miscellaneous income for the year beginning May 1, 1944, and ending on April 30, 1945, and *just take 8/12 of that amount, and you will find out how much he earned that year in addition to what he reported. You don't have to look at the books, you don't have to listen to Mr. Eustice, you don't have to listen to anybody. They show it themselves on their returns.* (Italics supplied.) [R. Vol. IV, p. 1549.]

* * * * * * * *

"* * * just because the defendant said to them he only earned $11,000, that doesn't mean that he only earned $11,000 extra that year. All that means is that that is all he told them, but he may have earned more, and the income tax return, the fiscal year return, if you take 8/12 of that you will find that it is closer to $22,000 and not $11,000.

"But even if it is $11,000; let us take $11,000, which he admitted he earned in 1944. *That's enough.* We don't have to prove the precise figure. We just have to show *a substantial amount.*

* * * * * * * *

"* * * Do you think anybody who reports income, as Mr. Ormont did, for the year 1944, of $12,000, and leaves off $11,000, is not filing a false return? He is reporting only half, according to his story, and only one-third the amount we say was not reported. (Italics supplied.) [R. Vol. IV, pp. 1551-1552.]

* * * * * * * *

"* * * *The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case.* (Italics supplied.)

* * * * * * * *

"* * * Why didn't *they* put Mr. Malin on the stand to tell you about it then? He is just as accessible *to them* as he is to me. And if it is their defense, it is their *witness.* They didn't put Mr. Moody on, they didn't put Mr. Malin on." (Italics supplied.) [R. Vol. IV, pp. 1560-1561.]

Specification of Error No. 54.

The Court erred in failing to give the following instruction requested by the defendant to the jury:

"You are instructed to return a verdict of Not Guilty as to Count One of said indictment." [R. Vol. I, p. 88.]

Specification of Error No. 55.

The Court erred in failing to give the following instruction, No. X-1, requested by the defendant to the jury:

> "If the taxpayer acts honestly under the advice of counsel or if the incorrect return is prepared by a Certified Public Accountant or a public accountant, who has knowledge of all the facts, the defendant is not guilty of any criminal intent." [R. Vol. I, p. 102.]

Appellant contended the instruction was the law as stated in *Kuhn v. U. S.*, 42 F. (2d) 210, and that the evidence in this case showed that appellant had consulted counsel and that the joint venture return was prepared by a Certified Public Accountant and that the appellant had acted under the advice of his attorney who advised the accountant as to what to do. [R. Vol. III, pp. 1094-1095 and 1125.] Exception was duly taken to this refusal. [R. Vol. IV, p. 1396.]

Specification of Error No. 56.

The Court erred in failing to give the following instruction, No. X-2, requested by the defendant to the jury:

> "The use of the word 'attempt' in the Code indicates that Congress intended some wilful commission in addition to the wilful omission that make up the list of misdemeanors, before a taxpayer can be found guilty of a felony." [R. Vol. I, p. 102.]

The grounds urged at the trial were that the instruction stated the law and was not covered by any other instruction and that it should be given, because in the absence of "wilful commission," the acts charged would only

amount to a misdemeanor under Section 145(a), I. R. C. Exception was duly taken to this refusal. [R. Vol. IV, pp. 1397, 1398.]

Specification of Error No. 57.

The Court erred in refusing to give the following instruction, No. X-3, requested by the defendant to the jury:

> "In weighing the testimony of Internal Revenue officers, greater care should be used than in weighing the testimony of ordinary witnesses because of the natural and unavoidable tendency of such officers to procure and remember with partiality such evidence as would be against defendant." [R. Vol. I, pp. 102-103.]

The grounds urged for this instruction was that it was a correct statement of the law (Reid Bronson Instructions to Juries, p. 61, sec. 3319), and that the record in this case warranted the giving of the same and that it should be given in order that the jury might be properly advised as to the weighing of such testimony. Exception was taken to such refusal. [R. Vol. IV, pp. 1398-1399.]

Specification of Error No. 58.

The Court erred in refusing to give the following instruction, No. X-4, requested by the appellant to the jury:

> "In order to establish the guilt of either of the defendants, the government must prove beyond all reasonable doubt not only an attempt to wilfully defraud it, but also that such defendant did actually defraud the government of a substantial portion of the tax due from such defendant, and that such tax was not paid by such defendant." [R. Vol. I, p. 104.]

The grounds urged for the giving of this instruction were that it was a correct statement of the law [as cited

under No. X-4, R. Vol. I, p. 104], was not covered by any other instruction. Exception was duly taken to such refusal. [R. Vol. IV, p. 1401.]

U. S. v. Schenck, 126 F. (2d) 702;
Gleckman v. U. S., 80 F. (2d) 394;
Tankoff v. U. S., 86 F. (2d) 868;
Hargrove v. U. S., 67 F. (2d) 820;
Rose v. U. S., 128 F. (2d) 622 to 626.

Specification of Error No. 59.

The Court erred in refusing to give the following instruction, No. X-6, requested by the appellant to the jury:

> "To establish its case, the government must prove beyond a reasonable doubt that the defendants not only attempted to wilfully defraud the government, but that at the time the indictment in this case was returned, to-wit, on January 22, 1947, a tax in addition to the tax already paid by such defendant remained due and unpaid, and that the defendant knew that he owed such additional tax. You are instructed that in order to convict either of the defendants in this case under the charges embraced in the indictment herein, the government must prove beyond all reasonable doubt that the alleged violations of said act were not only done by the defendant or defendants, but were done wilfully and knowingly, and not under an honest belief by the defendant that he had accounted and paid all tax legally due." [R. Vol. I, pp. 106-107.]

The grounds urged for this instruction were that it was the law which was laid down in the case of *United States v. Schenk,* 126 F. (2d) 702, and that the facts warranted the giving of the same because the tax had been

paid and that before a charge of wilful evasion can be brought, the tax must be due and owing at the time the indictment is returned. Exception was duly taken to this refusal. [R. Vol. IV, p. 1402.]

Specification of Error No. 60.

The Court erred in refusing to give the following instruction, No. X-8, requested by the appellant to the jury:

> "Failing to account and pay income tax in the proper year, and paying and accounting for the same in a different year by the taxpayer, and under his honest belief that that is when it is due does not constitute a violation of the Internal Revenue Code." [R. Vol. I, p. 105.]

The grounds urged were that it correctly stated the law (*Hargrove v. U. S.*, 67 F. (2d) 820; *Murray v. U. S.*, 117 F. (2d) 40; *Spies v. U. S.*, 317 U. S. 492), and no other instruction was being given thereon by the court and that "wilfully," as defined by the Court did not properly cover it and that the very defense of the defendant was based upon the proposition that he properly accounted for the tax in a different year under the belief that was correct.

Exception was duly noted to this refusal. [R. Vol. IV, pp. 1403-1406.]

Specification of Error No. 61.

The court erred in refusing to give the following instruction, No. X-9, requested by the appellant to the jury:

> "Failure of a taxpayer to report income which he honestly believed was not taxable does not constitute a wilful violation of the Internal Revenue Code." [R. Vol. I, p. 105.]

The grounds urged were that it correctly stated the law (*U. S. v. Fontaine,* 54 F. (2d) 371; *Murray v. U. S.,* 117 F. (2d) 40) and no other instruction was being given thereon by the Court and that "wilfully," as defined by the Court did not properly cover it and that the very defense of the defendant was based upon the proposition that he properly accounted for the tax in a different year under the belief that was correct. [R. Vol. IV, pp. 1403-1406.]

Specification of Error No. 62.

The Court erred in refusing to give the following instruction (No. X-8, second one by the Court) requested by the appellant to the jury:

> "It is not the purpose of the law to penalize frank difference of opinion or innocent errors made despite the exercise of reasonable care. Such errors are corrected by the assessment of the delinquency of tax and its collection with interest for the delay. If any part of the deficiency is due to negligence or intentional disregard of rules and regulations, but without intent to defraud, five per cent of such deficiency is added thereto; and if any part of any deficiency is due to fraud with intent to evade tax, the addition is fifty per cent thereof." [R. Vol. I, p. 111.]

The grounds urged were that it was a correct statement of law, as laid down in the case of *Spies v. United States,* 317 U. S. 492, 496-497. Exception was duly taken to such refusal. [R. Vol. IV, p. 1403.]

Specification of Error No. 63.

The Court erred in refusing to give the following instruction, No. X-10, requested by the appellant to the jury:

> "You are instructed that if you find from the evidence that defendant Sam Ormont paid all or a sub-

> stantial part of the income tax due and owing by him for the calendar year 1944 or paid an amount in excess of the income tax due and owing by him for the calendar year 1944, you must find the defendant Sam Ormont not guilty of Count 1 of the indictment." [R. Vol. I, pp. 87-88.]

The District Attorney withdrew his objection to instruction X-10 and the Court agreed to give X-10. Thereafter, the Court said he didn't think he would. Exception was taken to his ruling on the grounds that it was the correct statement of the law and not covered by any other instructions. [R. Vol. IV, pp. 1438, 1439.] It was warranted by the evidence. [R. Vol. II, p. 861; Vol. III, pp. 1078-1079.]

Specification of Error No. 64.

The Court erred in refusing to give the following instruction, No. X-12, requested by the appellant to the jury:

> "To establish its case, the Government must prove not only an attempt by the defendants wilfully to defraud it, but also that a tax in addition to what the defendants had already paid remains due and owing." [R. Vol. I, p. 87.]

The grounds urged were that it was a correct statement of the law, as laid down by the case of *United States v. Schenck,* 126 F. (2d) 702, and the case of *Gleckman v. United States,* 80 F. (2d) 394, and other cases. Exception was duly taken to this refusal. [R. Vol. IV, p. 1440.]

Specification of Error No. 65.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

> "It is a recognized principle of our system of law that in order to convict a defendant, the facts proven must not only be consistent with the theory of guilt, but inconsistent with any reasonable theory of innocence, and this I charge is the law." [R. Vol. I, p. 93.]

The grounds were assigned for the reason that the Court stated he was giving his own instruction, which fully covered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same. (See *Chandler v. U. S.,* 146 F. (2d) 424, 426; *Williams v. U. S.,* 140 F. (2d) 351, 352; *People v. Koenig,* 29 Cal. (2d) 87, at 92, 93, 173 P. (2d) 1.)

Specification of Error No. 66.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

> "It is not your duty to look for some theory upon which to convict the defendant, but, on the contrary, it is your duty and the law requires you to, if you can reasonably do so, reconcile any and all circumstances that have been shown with the innocence of the defendant, and so acquit him." [R. Vol. I, p. 93.]

The grounds were assigned for the reason that the Court stated he was giving his own instruction, which fully covered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same. (See above cases.)

Specification of Error No. 67.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

> "You are instructed that if one set or chain of circumstances leads to two opposing conclusions, one pointing to the guilt, the other to the innocence of the defendant, and the jury has any reasonable doubt as to which of such conclusions the chain of circumstances leads, a reasonable doubt is thereby created, and the defendant should be acquitted." [R. Vol. I, p. 94.]

The grounds were assigned for the reason the Court stated he was giving his own instruction, which fully covered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same. (See cases above.)

Specification of Error No. 68.

The Court erred in its charge to the jury as follows:

> "Any evidence that has been received on an act, omission or declaration of a party which is unfavorable to his own interests should be considered and weighed by you like any other admitted evidence, but evidence of the oral admission of a party, rather than his own testimony in this trial, ought to be viewed by you with caution." [R. Vol. IV, p. 1567.]

No assignment of error or exception was noted, as appellant's counsel was not served with a copy of any such instructions before it was given. The instruction is not a sufficiently full statement of the law for the reason that it did not advise the jury that before they consider any such declaration of the party that the Govern-

ment must first prove the *corpus delicti,* and the Court nowhere in his charge covered this condition, respecting *declarations.*

Carson v. United States, 147 F. (2d) 542;
Screws v. United States, 89 L. Ed. 1029.

Specification of Error No. 69.

The Court erred in its charge to the jury in the following particulars:

"* * * You will consider the testimony of any officer or employee of the United States Government the same as you would consider the testimony of such person if he were not so employed." [R. Vol. IV, p. 1573.]

This was objected to and appellant specifically requested contrary instruction No. X-3 which was refused by the court [R. Vol. IV, pp. 1398-1399] and Error No. 57, *supra.*

Specification of Error No. 70.

The Court erred in its charge to the jury as follows:

"* * * As to any evidence pertaining to the years 1942 and 1943, you are not to consider the same as proof of the crime charged in Count 1, except that if you should find beyond a reasonable doubt that the acts charged against said defendant in Count 1 were done by him, then you may consider the evidence pertaining to 1942 and 1943 for the sole purpose of determining whether or not any such acts as you may find from the evidence were done in 1944, as charged in the indictment, were wilfully and intentionally done by the defendant Ormont." [R. Vol. IV, p. 1574.]

No special grounds were cited to this instruction, but it was error to instruct the jury that they could consider evi-

dence pertaining to 1942 and 1943 at all and the evidence should have been stricken on defendant's motion. As the Court had found defendant "Not Guilty" in those years. See Errors No. 44, No. 45 and No. 55 and argument and authorities *post.*

Specification of Error No. 71.

The Court erred in its charge to the jury as follows:

> "The law under which these defendants were indicted in substance provides, as is applicable to this case, that any person who wilfully attempts in any manner to evade or defeat any tax shall be guilty of a crime. The pertinent portion of the statute provides as follows:
>
> > " 'Any person required under this chapter to account for, and pay over any tax imposed by this chapter, who wilfully fails to truthfully account for any and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof,' shall be punished in the manner provided by law." [R. Vol. IV, pp. 1574-1575.]

This was objected to [R. Vol. III, pp. 1407-1408].

Specification of Error No. 72.

The Court erred in his instruction to the jury, when instructing them as to the necessary proof of the sum alleged in the indictment, as follows:

> "* * * In other words, the Government need not establish as to Count 1 that the precise sum of $36,982.52 was the corect net taxable income of the

defendant Ormont for that year. * * *" [R. Vol. IV, p. 1576.]

This instruction was objected to and exception taken with the giving thereof on the ground that it was not a proper instruction and did not properly define what the Government must prove and was an improper illustration without telling the jury in the illustration that they must prove *substantially that sum* [R. Vol. III, pp. 1410-1412].

SPECIFICATION OF ERROR No. 73.

The Court erred in charging the jury as follows:

"Also, as to Count 1, I want to call your attention to the fact that it refers to an income and victory tax return, and that since there was no victory tax payable for the year 1944, the words 'victory tax' are surplusage, and may be disregarded by you." [R. Vol. IV, p. 1576].

This was objected to as not a proper statement of law and that the witness should be instructed that the Government would have to prove the charge as alleged in the indictment and this instruction permitted a variance [R. Vol. IV, pp. 1410-1411]. (See argument and authorities, *post*, under Error 7, pp. 104-111.)

SPECIFICATION OF ERROR No. 74.

The Court erred in the following charge to the jury:

"In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944." [R. Vol. IV, p. 1578.]

The above charge was never served on or submitted to appellant's counsel. Hence, no opportunity to accept. See exceptions to Errors Nos. 62-66, inclusive [R. Vol. IV, pp. 1402-1406, 1438-1439].

Specification of Error No. 75.

Th Court erred in the following charge to the jury:

"There has been placed in evidence the income tax return for the fiscal year May 1944 to April 1945, which was filed by the defendants on May 24, 1945. In this connection, it is part of your functions to decide whether the defendants actually had some income-producing enterprise, or enterprises, from which they derived the sum of roughly $71,000, which they reported on that fiscal year basis in that return. In this connection, you must determine what enterprise, if any, the defendants engaged in besides the operation known as the Acme Meat Company, if you decide they were engaged together in the Acme Meat Company, and whether the $71,000 reported on that return was actually received by them as part of the transactions carried on as the Acme Meat Company, or whether the money was received as income with reference to some other transaction not part of the Acme Meat Company sales and operations.

"Ultimately you are to decide in this connection, among other things, whether the $71,000 odd dollars reported on the fiscal year return was or was not part of the income derived from the sales made as part of the operations of the Acme Meat Company, and whether that money, or a substantial part of that money, was in fact received by each of the defendants as part of his income from the Acme Meat Company operations; and if not, then whether or not books and records were kept of such other enterprise as required by the statute.

"The statute in that connection, Section 41 of the Internal Revenue Code, reads as follows:

> " 'The net income shall be computed upon the basis of the taxpayer's annual accounting period (fiscal year or calendar year, as the case may be) in accordance with the method of accounting regularly employed in keeping the books of such taxpayer; but if no such method of accounting has been so employed, or if the method employed does not clearly reflect the income, the computation shall be made in accordance with such method as in the opinion of the Commissioner does clearly reflect the income. If the taxpayer's annual accounting period is other than a fiscal year as defined in section 48 or if the taxpayer has no annual accounting period or does not keep books, the net income shall be computed on the basis of the calendar year.' " [R. Vol. IV, pp. 1581-1583.]

This was objected to and exception taken on the ground that it was confusing, it pointed out evidence and claimed that evidence tended to prove certain things that were not proven, puts the burden upon the defendants to show a separate enterprise from the ACME MEAT COMPANY, did not tell the jury that if they found this income was received in 1945 and not received in 1944 that they need not consider it and the requesting of proper books was a matter of law and not a fact for the jury to decide [R. Vol. IV, pp. 1431-1433].

SPECIFICATION OF ERROR No. 76.

The Court erred in the following charge to the jury:

"The Internal Revenue regulations, which have the force of law, provide that the type of books *and* rec-

ords which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books *and* records which contain entries which are sufficient to establish the amount of gross income and the deductions, credits, and other matters required to be shown in returns, and that such books *and* records shall be kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.

"If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums *earned* must be reported upon the calendar year return for the year in which they were earned." (Italics supplied.) [R. Vol. IV, p. 1583.]

No special exception was taken for the reason that counsel assumed that Government counsel had truthfully stated the regulations, but he did not, as they did not require the keeping of books *and* records and they did not state that if none were kept, the income must be reported in the year *earned*.

Specification of Error No. 77.

The Court erred in the following charge to the jury:

"If you find beyond a reasonable doubt that the defendant Ormont, as charged in count 1, did wilfully and intentionally attempt to defeat and evade the *payment of taxes* due to the United States of America by filing a false and fraudulent *return* for the year 1944, in which he failed to disclose the true and correct amount of *income* which he had received during that year, then the government is entitled to a verdict of guilty as to Sam Ormont as to count 1." (Italics supplied.) [R. Vol. IV, p. 1586.]

This was objected to as a variance from Count I of the indictment, it did not state that the taxes were income taxes or that the income was taxable income or net income or that the "return" must be an "Income and Victory Tax Return" and that it did not state that the taxes must be substantially the amount alleged in the indictment by informing that if the jury found *any* unpaid taxes, they might find the defendant guilty.

The Court also told the jury, in effect, that they could convict if they found a false "return", yet the indictment charged *an income and victory tax return* and this instruction does not state that it must have been an *income tax* return [R. Vol. IV, pp. 1410-1415].

Specification of Error No. 78.

The Court erred in failing to instruct the jury on his own motion that the jury might find the appellant guilty of a lesser offense embraced within the charge in the indictment, namely, a misdemeanor under Section 145(a), I. R. C.

Specification of Error No. 79.

The Court erred in denying appellant's motion for acquittal, notwithstanding the verdict on the grounds set forth in the written motion for dismissal of the indictment, the motion for a bill of particulars, the motion for acquittal at the end of plaintiff's case and again at the end of all evidence [R. Vol. IV, p. 1609].

Specification of Error No. 80.

The Court erred in denying appellant's motion for a new trial on the grounds embraced within the motion to dismiss the indictment, motion for a bill of particulars, motion of acquittal at the end of plaintiff's case, motion for acquittal after all the evidence was in [R. Vol. IV, p. 1609].

ARGUMENT.

Specification of Error No. 4.

The Court erred in denying appellant's motion to dismiss and enter a plea of "once in jeopardy" made May 23, 1947, on the record before the Court in this case, showing that a jury had been duly impaneled and sworn to try the defendant and then had been dismissed without his consent [R. Vol. I, pp. 302, 303; Vol. IV, pp. 1627, 1638].

On May 22, 1947, Mr. Katz, attorney for defendant HIMMELFARB, *only* made a motion expressly on behalf of defendant HIMMELFARB to dismiss the indictment [R. Vol. I, p. 246], and a motion to withdraw a juror and declare a mistrial [R. Vol. I, pp. 257-258], to which plaintiff's attorney, Mr. Strong, stipulated [R. Vol. I, p. 259] and the Court thereupon granted the motion and dismissed the jury [R. Vol. I, p. 260]. This was all without the consent of appellant or his counsel and without said counsel being asked whether he consented thereto or not. The case was continued until May 23rd, at which time appellant's counsel made the following motion:

> "At this time, on behalf of the defendant Sam Ormont, I wish to make a motion to dismiss—I believe that covers that now—and to enter a plea of once in jeopardy, based upon the record in this case before your Honor, the minutes in this case, showing that a jury was duly impaneled and sworn to try the defendant and has since been discharged, and that the impaneling and swearing of that jury to try him constituted jeopardy. Therefore I move to dismsis as to him on the ground that he has been once in jeopardy." [R. Vol. I, p. 303.]

1. No person shall be twice put in jeopardy for the same offense under the constitutional guarantee, and this right is fundamental and cannot be frittered away or abridged by general rules concerning the importance of advancing justice.

Art. V of Amendments to Federal Constitution;

Art. I, Sec. 13, Calif. Const.;

Cornero v. United States, 48 F. (2d) 48, at 74 A. L. R. at 801 (9th C. C. A.).

2. Jeopardy attaches when jury is duly impaneled and sworn. Not necessary for any further proceedings.

Cornero v. United States, supra;

Jackson v. Superior Court, 10 Cal. (2d) 350.

3. A jury once duly impaneled and sworn becomes a part of the tribunal in which the defendant has a vested right to that specific jury, of which right he cannot be divested without his consent.

People v. Young, 100 Cal. App. 18, at 21-22;

Hartzell v. United States, 72 F. (2d) 569 (Iowa C. C. A. Cert. Den. 55 S. Ct. 216);

50 C. J. S. 927, Note 5 and authorities cited;

Craig v. United States, 81 F. (2d) 816 (C. C. A. Cal.), 83 F. (2d) 850.

Silence of the accused or his attorney does not constitute consent or a waiver of his constitutional right against being again put in jeopardy.

Barrett v. Bigger, 17 F. (2d) 669, Cert. Den., 274 U. S. 752;

United States v. Watson, 28 Fed. Cas. #16651;

State v. Stiff, 117 Kan. 243, 234 Pac. 704;

Commonwealth v. Gray, 249 Ky. 36, 60 S. W. (2d) 133.

The Court, in ruling on the motion, said:

> "The Court: I was under the impression that the motion was made on behalf of both defendants. Even so, in considering the matter on the merits, I do not think the motion for a once in jeopardy plea is well taken. * * *" [R. Vol. I, p. 304.]

The Court was presumably referred to an oral stipulation entered into in chambers, pertaining to procedural matters sometime prior to the impanelment of the jury, which is set forth in the Record, pages 240-241, to the effect that during the trial, inasmuch as there were two defendants with separate counsel, the Court inquired if, under those conditions, any motions, objections or stipulations made by either defendant may be made on behalf of both defendants, unless they are specifically disclaimed. Then, the Court further stated:

> "The Court: Unless it appears obvious from the statement or objection that it applies only to one person, but such general motions or objections that are made throughout the trial will apply to both." [R. Vol. I, p. 241.]

Appellant's counsel understood this only applied to procedural matters and particularly to objections to evidence in order to simplify the Record [R. Vol. I, p. 304] and this was apparently the Court's interpretation, because immediately following said *oral* stipulation, Mr. Robnett, on behalf of appellant, made a motion and the Court asked the question if that was made on behalf of both defendants, to which Mr. Katz, attorney for the other defendant, said he intended to make a specific motion of his own [R. Vol. I, pp. 241-242], and before Mr. Katz made the motion to discharge the jury and at the opening of that session of Court, Mr. Robnett told the Court that he and his associate counsel had motions to make [R. Vol. I,

p. 245]. Mr. Strong then addressed the Court on some matters. Then the Court said:

"The Court: Very well, Mr. Katz?"

Then Mr. Katz made his said motions, while appellant's counsel waited until he had finished to make motions they had in mind, of which they had just informed the Court. The motions by Mr. Katz were specifically prefaced with a statement that he was making them on behalf of Mr. HIMMELFARB. Therefore, it not only appeared "obvious" but "specific" that the motions he was making were to apply to his client only. However, as was said in the case of *United States v. Watson,* 28 Fed. Case #16651, "The fact that the Court and the District Attorney regarding the defendants as consenting to the Court's action that was taken (discharge of jury) ought not, in the absence from the minutes of the Court of any statement that they consented, to conclude them." In addition, an attorney under his general employment has no authority in the absence of "specific and express authority" from his client to surrender or stipulate away any substantial right of his client.

7 C. J. S. 897, 922, Note 50;

Glover v. Bradley, 233 Fed. 721;

United States v. Newman, 25 F. (2d) 357 (reversed on other grounds 28 F. (2d) 1684);

Bonnifield v. Thorp, 71 Fed. 924 (appeal dismissed 83 Fed. 1002);

Price v. McComish, 22 Cal. App. (2d) 92 at 97-99 (even though the stipulation was in open court in the presence of his client);

Davidson v. Gifford, 100 N. C. 18, 6 S. E. 718;

Holt v. State, 160 Tenn. 366, 24 S. W. (2d) 886;

Jacobs v. State, 85 Tex. Crim. 505, 213 S. W. 628;
Redsted v. Weiss, 71 Cal. App. (2d) 63;
State v. Crane, 202 Mo. 54, 100 S. W. 422;
Vol. I, Thornton on Attorneys-at-Law, page 386.

Even the consent of accused's counsel to the discharge of the jury after it has been impaneled and sworn is not binding on the accused and does not prevent his reliance on the plea of further jeopardy.

Cliett v. State, 167 Ga. 835, 147 S. E. 35 (39 Ga. App. 510, 147 S. E. 724);

Hipple v. State, Tex. Crim. 191 S. W. 1150, L. R. A. 1917(d) 1141, 22 C. J. S. 400 (Note 67).

Even though the consent by counsel was in open Court and in the presence of the accused, the latter is not bound unless he is given express authority.

Price v. McComish, supra;

Davidson v. Gifford, supra.

We quote from the *Price v. McComish* case:

"Nor does the fact that an admission or stipulation was made in open court by an attorney in the presence of his client necessarily vary the rule. In the case of *Davidson v. Gifford* (1888), 100 N. C. 18 (6 S. E. 718), it was said:

"'Merely casual, hasty, inconsiderate admissions of counsel in the course of a trial do not bind the client. They are not intended to have

such effect, nor does the nature of the relation of attorney and client produce such result. *And this is so, although the client be present when such inconsiderate admissions are made.* It would be rude, indecorous, disorderly, and confusing if the client should interpose to correct his counsel, and disclaim his authority to make such admissions. Neither the court, counsel, nor any intelligent person expects him to do so. * * *' "

Hipple v. State, supra.

Oral stipulations made during a trial and not reduced to writing should be limited so as not to extend beyond what the parties thereto clearly intended.

Orr v. Ford, 101 Cal. App. 692, at 699-700, 25 Ruling Case Law 1105.

Stipulations purporting to waive or relinquish a substantial right must be strictly construed.

Burnham v. North Chicago Street Railway Co., 88 Fed. 627;

Carnegie Steel Co. v. Cammria Iron Co., 185 U. S. 403;

Rio Grande Oil Co. v. Upton Oil Co., 33 Ariz. 474, 266 Pac. 3.

Uniform procedure is to specifically ask defendant to personally consent or stipulate and not accept his attorney's stipulation alone.

People v. Baillie, 133 Cal. App. 508, at 511-513.

Specifications of Error Nos. 1, 2 and 3.

Specifications of Error Nos. 1, 2 and 3 being the motion to dismiss the indictment, the motion for a bill of particulars and the motion for a continuance until the bill of particulars was furnished, will be presented together, said Specifications being printed in full in the Appendix, annexed hereto.

Specification No. 1 was a motion to dismiss the indictment on the ground of multifariousness and uncertainty in that it did not state a public offense, did not show that any tax was due or unpaid or how the filing of a victory tax return could defeat or evade the tax for 1944, what portion of alleged tax was victory tax, what portion normal tax and what portion surtax and that a felony and misdemeanor were improperly joined and not separately stated.

The motion for a bill of particulars demanded the items, sums, figures and facts showing the basis of the alleged income and income tax and the sums from which the Government derived such facts, items and figures from which it made its calculations.

The motion for continuance was based upon the ground of surprise, inability to prepare for defense, the cause of insufficiency of the indictment and lack of proper bill of particulars.

> "To establish its case the Government must prove not only an attempt *wilfully* to defraud it but also that a tax in addition to what the taxpayer had already paid *remains due and owing.*"
>
> *United States v. Schenck,* 126 F. (2d) 702;
>
> *Hargrove v. United States,* 67 F. (2d) 820;
>
> *Gleckman v. United States,* 80 F. (2d) 394;
>
> *Tinkoff v. United States,* 86 F. (2d) 868.

It is elementary that every fact necessary to constitute the crime must be directly and positively alleged in the indictment.

42 C. J. S. 972, Sec. 99;

Norton v. United States, 92 F. (2d) 953 (C. C. A. Cal).

Count I of the indictment contained no allegation that any tax, in addition to what the taxpayer had already paid, "remains due and owing," as required by the above authorities. The facts charged in an indictment must be facts and not conclusions.

42 C. J. S. 994, Sec. 114;

United States v. Minnec, 104 F. (2d) 1575;

Boykin v. United States, 11 F. (2d) 484;

Cooper v. United States, 299 Fed. 483.

An allegation that one "owed" an obligation is a conclusion and not a statement of fact, just as the allegation that there is now due is held to be a conclusion.

Frisch v. Caler, 21 Cal. 71;

Roberts v. Treadwell, 50 Cal. 520;

Scrofe v. Clay, 71 Cal. 123;

Knox v. Buckman Contracting Co., 139 Cal. 598.

In the latter case, it is held that the allegation "that the whole of said note is owing * * *" is not an allegation of nonpayment. There, it will be observed, the allegation is in the present, whereas the allegation in Count I of the indictment "he owed" is not.

Under the 1944 Internal Revenue Code, no taxpayer was required to file an "income and victory tax return."

Therefore, the filing of the same, as alleged in Count I of the indictment, would not constitute an attempt to evade a tax and even if such a "so-called" return was filed and even if it were false, it would not be a violation of law because it was nothing upon which the Government could accept as the only return that was authorized that year was a simple income tax return. Failure to file the kind of a return required by the law for that year is not charged as one of the means of attempting to evade.

Kitrell v. United States, 76 F. (2d) 333;
Hargrove v. United States, 67 F. (2d) 820;
Spies v. United States, 317 U. S. 492;
O'Brien v. United States, 51 F. (2d) 193.

The Court should have ordered a bill of particulars, as demanded, as defendant is entitled to such a bill *as a matter of right* where it does not appear from the indictment, with sufficient particularity, what the charges are the defendant will have to defend against, even though the indictment set forth facts constituting the essential elements that it could not be pronounced bad on a motion to dismiss, where the charge is couched in such language that the defendant is liable to be surprised and unprepared.

Singer v. United States, 58 F. (2d) 74;
Wilson v. United States, 270 Fed. 307;
Filiatreau v. United States, 14 F. (2d) 659;
Lett v. United States, 15 F. (2d) 686;
O'Neill v. United States, 19 F. (2d) 322.

Where the allegations in an indictment for evasion of income tax set forth the figures claimed to be correct as gross income or net income, without showing the basis of such figures, and the items composing the same, defendant is entitled to a bill of particulars, showing all such facts as the basis of such figures and the ~~sums~~ sources from which obtained, in order that he may properly prepare for his defense.

United States v. Empire Paper Corp., 8 Fed. Supp. 220;

United States v. Farrington, 11 Fed. Supp. 215.

which authorities are based upon *Singer v. United States, supra.*

No such bill of particulars was ever ordered or furnished and appellant was therefore in the dark and was, of necessity, taken by surprise at the trial and his motion for a continuance of the case until such bill was furnished should have been granted. See authorities above cited.

This was absolutely demonstrated in the progress of the trial, as shown by the statement of the Court, when he granted the acquittal on Counts III and IV and said the whole case was built up by an arbitrary accounting method used by the Government agent [R. Vol. IV, p. 1370]. Naturally, defendant was taken by surprise by such system of accounting and could not possibly prepare for a defense thereto, without first having the bill of particulars as to what basis the Government was using for its calculations.

Specifications of Error Nos. 5 and 6.

The Court erred in denying appellant's motion for immunity and for a dismissal on the ground that appellant was subpoenaed and required to testify before the Grand Jury without being advised of his constitutional rights on matters involved in charges set forth in the indictment in this case [R. Vol. I, pp. 305-307; Vol. IV, pp. 1627, 1638].

The Court erred in denying appellant's motion to suppress all evidence and grant defendant immunity based upon the ground that he had been subpoenaed and required to testify before the Grand Jury, without being first advised of his constitutional rights, on matters embraced within the charge in this case [R. Vol. I, pp. 310, 311; Vol. IV, pp. 1627, 1638-1639; Vol. I, pp. 141-146].

On page 305 of the Record, the following transpired:

"The Court: Do you have any other motions to make out of the presence of the jury, either of you?

Mr. Robnett: We have not received the transcript of the testimony of our defendant before the grand jury, which I understand was to be written up for us.

* * * * * * * *

The Court: That is the transcript that I referred to yesterday, I understand.

Mr. Robnett: Yes.

The Court: Well, your motion for a dismissal now on the ground that the defendant Sam Ormont was called to testify against himself in the indictment as based on that, that is, as to the OPA case—

Mr. Robnett: Yes.

* * * * * * * *

The Court: If you wish to make the motion as a matter of record to protect your record at this time, I will deem it made on the same grounds in this case that you made it in the other case.

Mr. Robnett: I would like to have it so considered then, Your Honor, and that that transcript be considered on that motion.

The Court: I will deny the motion without prejudice to its renewal."

Appellant also made a motion to suppress all evidence pertaining to meat and meat prices, sales and invoices and the like, on the same grounds [R. Vol. I, p. 310].

The motion referred to in the OPA case was an application and a motion for immunity and for an order barring further prosecution of defendant SAM ORMONT, on the ground that he had been subpoenaed before the Grand Jury of the Southern District of California, Central Division, in February, 1946, and compelled to give testimony in an investigation, then pending, of alleged violations of the Emergency Price Control Act in the purchase and sale of meat, and was not advised as to his constitutional rights to refuse to answer any questions, the said written motion in the OPA case, which was considered as made in this case, is set forth in R. Vol. I, pp. 141-150. The evidence given by Mr. ORMONT before said Grand Jury is set forth in full in R. Vol. I, pp. 214-237, and, in substance, was that Mr. ORMONT was asked concerning his slaughtering of cattle; the prices he was paying to have the same slaughtered; and, particularly, those prices he was paying to SOUTHERN CALIFORNIA MEAT COMPANY, THE CALIFORNIA MEAT COMPANY, CHARLES M. KING, HYMAN STILLMAN and LOU SEGAL; and as to

extra services that were being charged him in that connection by those concerns; the profits he made from the sale of beef and veal (this period covered several years, including 1944, and specific testimony as to various and specific amounts of money so paid for extra services). He was asked about various invoices.

An indictment, containing fifty counts, was returned by said Grand Jury in Case No. 18366, U. S. District Court for the Southern District of California, Central Division, against the SOUTHERN CALIFORNIA MEAT COMPANY, INC., CHARLES M. KING, HYMAN STILLMAN and LOU SEGAL and is set forth in full in R. Vol. I. pp. 151-203. The defendants, CHARLES M. KING and SOUTHERN CALIFORNIA MEAT COMPANY entered pleas of guilty in said case [R. Vol. I, p. 204].

The motion to suppress an objection to the introduction of any evidence upon the grounds stated in said applications for immunity and suppression were renewed after the second jury was impaneled and sworn and when the first evidence was offered by the Government [R. Vol. I, pp. 321-322].

A witness who is subpoenaed before a Grand Jury and gives testimony pursuant thereto does so under compulsion.

United States v. Kallas, 272 Fed. 742, 752;
United States v. Kimball, 117 Fed. 156, 163;
Counselman v. Hitchcock, 142 U. S. 547;
In re Simon, 297 Fed. 942;
People v. Schwartz, 78 Cal. App. 561, 570;
People v. O'Brien, 165 Cal. 55, 62.

A witness subpoenaed and compelled to testify is entitled to immunity from future prosecution, whether he claimed it or not at the time he gave the testimony or whether or not he refused to answer on the ground of incrimination.

United States v. Monia, 317 U. S. 424, 87 L. Ed. 376;

United States v. Kallas, supra;

United States v. Edgerton, 80 Fed. 374;

United States v. Wetmore, 218 Fed. 227.

"To bring a person within the immunity of this provision (provision of the Constitution), it is not necessary that the examination of the witness should be had in the course of a criminal prosecution against him, or that a criminal proceeding should have been commenced and be actually pending. *It is sufficient if there is a law created by offense under which the witness may be prosecuted.* If there is such a law and if the witness may be indicted or otherwise prosecuted for a public offense arising out of the acts to which the examination relates, he cannot be compelled to answer in any collateral proceeding, civil or criminal, unless the law has absolutely secured against any use in a criminal procedure of the evidence he may give; and this can only be done by a statutory provision that *if he submits to an examination and answers the questions, he shall be exempt from criminal prosecution from any offense* that may be disclosed as a consequence of his examination." (Italics supplied.)

In re Tahbel, 46 Cal. App. 755, at 759;

Counselman v. Hitchcock, supra;

Ex parte Clark, 103 Cal. 352;

In re Williams, 127 Cal. App. 424, at 431.

The evidence given by Mr. ORMONT before the Grand Jury not only affected the matter of sales of meat, but the testimony with regard to payment of extra charges for slaughtering which would, of necessity, affect his income and his testimony as to the invoices or such matters and recording of such charges on his books, if such charges were in violation of the OPA regulations, and, presumably, they were, else KING and SOUTHERN CALIFORNIA MEAT COMPANY would not have entered pleas of guilty to the indictment, such extra charges might not be a proper reduction of his income. Therefore, the fact that Mr. ORMONT was subsequently indicted for alleged evasion of income tax for the years covered, this Grand Jury testimony entitled him to immunity from such prosecution. The OPA case, when its written motion for immunity was filed [R. Vol. I, p. 141], was an indictment charging this appellant with violation of the OPA regulations and embraced transactions with the SOUTHERN CALIFORNIA MEAT COMPANY. That the appellant is entitled to immunity in this case, by reason that the Grand Jury testimony is irrevocably affirmed by the United States Attorney for the Southern District of California, Honorable James M. Carter, and his assistant, Mr. William Strong, who on the 9th day of May, 1947, served and filed herein a motion to consolidate the said OPA case and the case at bar [R. Vol. I, pp. 80-84], and in support of said motion they signed points and authorities in which they said:

> "Obviously the different offenses charged in each of the two indictments here could have all been joined in one indictment. The defendants are the same in all of the counts in each of the indictments, and *the*

offenses arise out of almost precisely the same series of transactions and facts.

"The proof as to each of the indictments would be almost precisely the same. Evidence which discloses the commission of the offenses with reference to overcharges for sales of meat in violation of the Emergency Price Control Act will be presented in support of the conspiracy count, charging a conspiracy to violate the Emergency Price Control Act. *In proof of both the substantive violations and the conspiracy in that respect evidence as to the income of the defendants, the income tax returns and income tax disclosures will also be offered.*

"In support of the income tax evasion indictment, the same evidence will be used to prove that the defendants earned the sums which the Government charges them with having received, and that they unlawfully failed to make proper disclosures of their income and pay the proper tax.

* * * * * * * *

"Manifestly, in this instance, consolidation of the indictments for trial is not only wholly proper, but constitutes the most feasible and only practical course of trying these defendants. The consolidation is within the discretion of the trial court: Since both defendants are charged in each count of both indictments, since the offenses charged are 'of the same or similar character,' are based substantially 'on the same act or transaction,' and are manifestly 'two or more acts of transactions connected together or constituting parts of a common scheme or plan' (see Rule 8, *supra*). The requirement of Rule 13, which permits the trial of indictments together 'if the offenses, and the defendants * * * could have

been joined in a single indictment * * *' has been fully met." (Italics supplied.) [R. Vol. I, pp. 83-84.]

The appellant in this case did not waive his immunity and, in fact, would not do so, as was stated by Mr. Strong as follows:

"The Court: I do not remember the case, but I remember the old rule which I ran into as a district attorney myself—of course I never had this situation arise because where there was any possibility of a defendant being indicted I always had him sign a waiver of immunity.

Mr. Strong: They wouldn't do it." (Italics supplied.) [R. Vol. I, p. 276.]

Specification of Error No. 7.

The Court erred in overruling appellant's objections and admitting Government's Exhibits Nos. 1, 2, 3 and 4, which objections were as follows:

"Mr. Robnett: * * *

'Now, Your Honor, take up the offered exhibits. They are in for identification with numbers.

The Court: 1, 2, 3, 4, 5.

Mr. Robnett: Yes. Taking up No. 1, which appears to be an individual income tax return for 1942, for the calendar year, by Sam Ormont, I wish to object to the introduction of that as not being within the issues in the indictment and the plea of the defendant of not guilty, for the reason that the count it would be under—

The Court: Count 4.

Mr. Robnett: I will have no such objection, I see, as to that one.

My objections rather will be to exhibit for identification No. 3, which is the individual income tax return for the calendar year 1944 by Sam Ormont. I object to that on the ground that under the only count in the indictment, No. 1, that that would be applicable, if at all—it is not admissible because it is not within the charge in that count for this reason: This return, if Your Honor will examine it, is a simple return of ordinary taxes and no Victory tax whatever, yet the charge in the indictment of what this defendant did was that he filed a false and fraudulent income and Victory tax." [R. Vol. I, pp. 335-336; Court's Ruling, p. 339; Vol. IV, pp. 1627, 1638.]

An examination of Exhibit 3 will show, in bold face type, capital letters, as follows:

"U. S. Individual Income Tax Return for Calendar Year 1944"

Nowhere thereon are the words "Victory tax," either in the total or in any portion of the body of said form of return. A comparison of Exhibit 3 with Exhibit 2, namely, individual income and victory tax return for 1943, will show there was a vast difference between an individual income tax return and an income and victory tax return. For instance, Exhibit 2, in bold face type, capital letters, at the top thereof, reads:

"U. S. Individual Income and Victory Tax Return 1943"

and on that first page there appears a separate schedule, set off in brackets or divided with bold face lines, and with the words in large, bold face capital letters, "Income

AND VICTORY TAX" and above those words, on line 19, were the words, "Victory tax net income, Item 10, Col. 2 less Item 17, Col. 2." At the top of page 4 appears "Computation of income and *Victory tax*" and on line 8 thereof are the words "Normal tax," line 9 "Surtax," line 10 "Total income tax," line 12 in bold face type "Balance of Income Tax" and line 13 in bold face type "Net *Victory Tax*" (Line 6 of "*Victory tax* Schedule below") and line 20 "Total income and *Victory Tax*," Line 22 in bold face type "Unpaid Balance of Income and *Victory Tax*." Then follows "Schedule K—*Victory Tax* and underneath are 13 lines of printing, all pertaining to *victory tax* and set off separate under said schedule. Nothing of this kind is set forth in Exhibit 3. The fact of the matter is Exhibit 3 only contains two pages, whereas Exhibit 2, the Income and *Victory Tax* Return, contains four pages.

Count I of the indictment specifically charges the *manner* in which and the *means* by which the Government alleged and claimed defendant and appellant committed the alleged crime. The first such "manner and means" is set forth as follows:

> "(1) By preparing and causing to be prepared, and filing and causing to be filed with the Collector of Internal Revenue for the Sixth Internal Revenue Collection District of California a false and fraudulent income and 'victory tax' return * * *"

wherein it is claimed that he falsely stated the amount of his income and victory tax. Then they set forth amount of income he reported and the amount of tax he reported and then set forth what they claimed the income tax was, which is a figure some $23,000.00 greater, and the tax was, which is some $14,000.00 greater.

VARIANCE.

"It is a uniform rule that the proof must correspond to the allegations; if there is a discrepancy in the indictment, it is a variance."

42 C. J. S. 1273, Sec. 254;

Berger v. United States, 295 U. S. 78, 79 L. Ed. 1314 (Reversing C. C. A., 73 F. (2d) 78);

Andrews v. United States, 3 F. (2d) 379;

Fox v. United States, 45 F. (2d) 364;

United States v. Wills, 36 F. (2d) 815;

Mulligan v. United States, 120 Fed. 98;

Carney v. United States, 163 F. (2d) 784;

People v. Deysher, 2 Cal. (2d) 141;

People v. Connors, 77 Cal. App. 438.

Allegations which are descriptive of the manner in which a crime is committed cannot be rejected as surplusage, but must be proved as alleged.

People v. Deysher, supra;

People v. Handley, 100 Cal. 370;

People v. Strassman, 112 Cal. 683;

People v. Lapique, 10 Cal. App. 669;

Hightower v. State, 39 Ga. Appeals 674, 148 S. E. 300;

Kutler v. United States, 79 F. (2d) 440;

United States v. Howard, 26 Fed. Case #15403, 3 Sumn. 12, 15.

Thus, in the case of *People v. Deysher, supra,* it was said:

> "* * * An allegation otherwise not essential may become material *and must be proved in all cases when descriptive of that which is necessary to the charge.*" (Italics supplied.)

And quoting from the case of *Hightower v. State, supra:*

> "If the indictment sets out the offense *as did in a particular way, the proof must show it so, or there will be a variance.* And where there is a necessary allegation which cannot be rejected, yet the pleader makes it unnecessarily minute in the way of description *the proof must satisfy the description* as well as the main part, since the one is essential to the identity of the other." (Italics supplied.)

Naftzger v. United States, 200 Fed. 494;

United States v. Brown, 24 Fed. Case #14666, 3 McLean 233;

United States v. Keen, 26 Fed. Case #15510, 1 McLean 429;

United States v. Porter, 27 Fed. Case #16074, Brunn Col. case #54.

See, also, 31 C. J. 837, Sec. 445.

In the case of *People v. Strassman, supra,* defendant was charged with perjury, in which charge it is claimed he made a false affidavit to a bail bond for a party charged with "grand larceny." The record showed that the bail bond was for release of the party charged with the crime of "robbery" and not "grand larceny." The Supreme

Court reversed the case and held that there was a variance and said:

> "* * * Upon the trial there was no evidence offered to substantiate these averments; no showing was made that proceedings upon a charge of grand larceny were or had been pending against her, and the proof was limited to the establishment of a fact at total variance with the charge in the indictment, namely, that the proceedings against Kate Farley were for the crime of robbery. * * *
>
> * * * * * * * *
>
> "So plainly marked is the variance that the facts themselves foreclose the need of discussion. But in illustration of the principles enunciated, and of their application to cases where the failure or omission has been much less conspicuous than that under review, may be instanced generally the cases of *People v. Coon,* 45 Cal. 672; *People v. Cox,* 40 Cal. 275; *Moore v. State,,* 12 Ohio St. 387; *State v. Crogan,* 8 Iowa 523; *Chute v. State,* 19 Minn. 271; * * *."

In the case of *People v. Coon,* 45 Cal. 672, the charge there was theft of *five* certificates of corporate stock for a stated aggregate number of shares. Proof was of *one certificate* for said number of shares. Variance held fatal.

In the case of *People v. Deysher, supra,* defendant (a public officer) was charged with a crime, under Section 71 of the Penal Code, of being interested in a public contract, which contract was alleged in the indictment as a contract for road work on the "Nicasio Road in Road District #5." This was the only identification of the

contract. The contract offered in evidence and attempted to be proved was a contract for road work at "White Hills in Road District #2." Held that this was a fatal variance and reversed the case on that ground.

People v. Reed, 70 Cal. 529. Defendant was indicted for obtaining under false pretenses a promissory note alleged to have been executed by a certain named person. The note offered in evidence was executed by said named person *and by another.* Held fatal variance and reversed the case for that reason.

In *United States v. Denicke,* 35 Fed. 407, the Court held where a defendant was charged with embezzling from the mails a letter directed to "The Traveler's Ins. Co." The proof shows that it was directed to "The Traders Ins. Co." Variance held fatal. The rule as shown by the foregoing authorities and as universally laid down in 31 C. J. 852, is that any variance between the plea in the indictment and the proof respecting any writing or written instrument is fatal.

In the recent case of *Carney v. United States,* 163 F. (2d) 784, it was held that the defendants were charged with counterfeiting "K14h" gasoline coupons, while the evidence showed "A14h" gasoline coupons. The case was reversed for variance, even though counsel consented to the indictment being amended to conform to the proof.

So, in the case of *People v. Wong Au Leong,* 99 Cal. 440, the defendant was charged with the crime of assault with an intent to commit murder and the indictment al-

leged that the assault was with a deadly weapon, to wit, a knife. At the trial, the prosecution, over objection, introduced evidence that the defendant had a gun. It was held that this was highly prejudicial and reversed the case. In the case at bar, the charge of the "means" by which defendant was supposed to have committed the evasion, namely, by filing a false and fraudulent income and victory tax return, was an essential part of the indictment and it was error to offer evidence of any other kind of an income tax return. Where, in the case of an assault, the crime may be committed in several different ways, an allegation of the manner in which it was committed or the "means" of commission becomes material. Therefore, when in the indictment the manner of commission is set forth the Government is bound thereby, and limited to those manners set forth in the indictment. See *People v. Connors,* 77 Cal. App. 438, in which case the defendant was charged with the crime of "attempting corruptly to influence a trial juror." The indictment alleged "by means of a written communication" which was set forth in the indictment. We quote from the opinion on page 447:

> "It is *the settled law that where an instrument in writing* constitutes the gravamen of a cause of action or an essential element of the body of the crime or is alleged to have been the specific means by which a crime has been committed, such instrument must be proved substantially, or, perhaps, in many cases, precisely, as it is pleaded. * * *" (Italics supplied.)

Specification of Error No. 8.

The Court erred in overruling appellant's objection to the introduction in evidence of Government's Exhibits 38 and 39, or the introduction of any testimony in connection therewith by witness ERNEST LINK, which objection was as follows:

> "Q. (By Mr. Strong): Now may I show you a group of invoices which are marked Government's Exhibit 38 for identification and ask you if you ever saw those before.
>
> Mr. Robnett: If the court please, in connection with these invoices I wish to make an objection that they are incompetent, irrelevant and immaterial, and should not be shown to the witness or any testimony admitted thereon. I have a matter that I would like to present to your Honor."

Thereupon the Court said:

> "The Court: Do you have other exhibits of this nature which you wish to have marked for identification with this witness?
>
> Mr. Strong: Just one more.
>
> The Court: In other words, if you can get all the exhibits you are going to use in with this witness, maybe we can wrap all the objections up at one time.
>
> Mr. Strong: Very well.
>
> The Clerk: No. 39.
>
> (The document referred to was marked Government's Exhibit 39 for identification.)"

Exhibits 38 and 39 are 1942 invoices of ACME MEAT COMPANY [R. Vol. I, pp. 398, 399, 400-401, 416; Vol. IV, p 1627].

It was error to admit these exhibits for the reason that there was no sufficient foundation and hence they were incompetent because it was not shown these exhibits were not entered on the books and properly taken into account in 1942, the year they are dated. The witness' only testimony was that he did not believe that he entered them, because they did not bear his special mark [R. Vol. I, p. 415], but that he never checked the books [R. Vol. I, p. 417].

The foregoing evidence was inadmissible because the same was not competent in that it was not of the character of proof which the law permits in the particular case.

31 C. J. S. 530;

Portes v. Valentine, 41 N. Y. Supp. 507, 18 Misc. 213;

Hart v. Newland, 10 N. C. 122.

It is a sufficient objection to the introduction of evidence to say that the same is "incompetent" where the evidence is not proper.

People v. Mullings, 83 Cal. 138, at 144;

31 C. J. 405, Note 59.

Specification of Error No. 23.

This error was set forth in full in the Appendix hereto. Briefly, this error consists of objections to questions asked the witness as to what the books and records of the Acme Meat Company showed with regard to whether or not Exhibits X, V, O, S and AA, consisting of various cancelled checks, were used to buy bonds, the objections being that the books were the best evidence, that the question was incompetent, irrelevant and immaterial, and calling

for a conclusion of the witness. The objections were overruled and the witness testified that the books, in each instance, did not so show. The Court, in overruling the objection, said that they were not timely and that appellant's counsel had waived them by prior cross-examination of the witness.

The witness had testified that he used the same method of accounting for 1942, 1943 and 1944 [R. Vol. I, p. 549], which was to account for all the funds that came from known sources, and whenever he didn't know the sources, he charged them up as unexplained taxable income. His whole information concerning the bonds was pure hearsay, as it came from Mr. PHOEBUS, and in addition the bonds were in two names [R. Vol. II, p. 727; see, also, Exhibit 42], which made them co-tenants, either as tenants in common or joint tenants. California Civil Code, Sections 682, 685, 686, and under the amendment of January 23, 1940, to Section 123 of Dept. Cir. 530, dated December 15, 1938 (Sec. 315.1 and 2 and 3 of (b) of Title 31, Code of Federal Regulations, Supplement I), it is expressly provided that as to the form of registration of Government—

> "Where the bonds are registered in two names in the disjunctive, they are nevertheless co-owners with the right of survivorship."

The safety deposit box was likewise in the name of two or more persons [R. Vol. III, p. 1082]. Nevertheless, the witness charged all of the bonds to the appellant and where he could not find appellant's record where any of the bonds were paid for, he charged appellant with unreported income, regardless of who paid for it and without any evidence of who paid for it, for that amount. This

is the kind of evidence the Trial Judge referred to when he said, as to Counts II and III, the case was built up on an arbitrary accounting method used by the Government agents [R. Vol. IV, p. 1370], and all of which evidence went in over running objection.

Cross-examination is not a waiver of a prior objection to the witness' testimony.

Jameson v. Tully, 178 Cal. 380, 384;

Balcom v. Growers Warehouse, 55 Cal. App. 482 (holding by Supreme Court in denying petition for hearing);

Moore v. Norwood, 41 Cal. App. (2d) 368-9.

Further than this, the cross-examination was not on the books and records, but upon the witness' work papers and the witness never was asked on cross-examination as to what the books showed with respect to the checks and exhibits to which the foregoing objections were made, and it was certainly prejudicial error to allow the witness to testify over these objections as to what the books showed.

Specification of Error No. 24.

The Court erred in overruling the following objection to the testimony of witness SAMUEL J. PHOEBUS, occurring on May 18, 1945, and who was at the time a Deputy Collector:

"Q. (By Mr. Strong): Going back to May 15, 1945, the occasion on which you testified you spoke to Mr. Ormont, on the premises of the Acme Meat Company, with reference to Mr. Ormont's income, will you please state what you said to Mr. Ormont, and what Mr. Ormont said to you in that connection?

* * * * * * * *

Mr. Robnett: Will it be understood that my prior objection to similar questions has been made?

The Court: I think you had better state it for the record.

Mr. Robnett: I object upon the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; there has been no showing that this man advised the defendant Ormont what his purpose was there, or that anything he might state could be used against him; that he had a constitutional right to refuse to answer; and no proper foundation.

* * * * * * * *

Mr. Robnett: And on the further ground that there has been no *corpus delicti* established as to the defendant Ormont." [R. Vol. III, pp. 1023, 1024; Vol. IV, pp. 1627, 1638.]

The substance of the testimony of the witness was that they asked him if he had been required to pay other people amounts which were not on the books to which he first said "no" and finally said "yes" and he admitted that he had made extra payments; in answer to the witness' questions as to whether or not he had attempted to pass these overpayments on to his own customers, he said "no," but asked whether or not if an inspector of meat graded as Class "B" meat he had paid Class "A" prices for, if he attempted to pass this price on to his customers and if he admitted such a thing to the Bureau of Internal Revenue, would they come in and determine his income on the presumption that all sales had been so made and he was told "no" [R. Vol. III, pp. 1025-1026].

The witness subsequently admits that he does not think that there was any warning given to Mr. Ormont [R.

Vol. III, p. 1028] and then states it was May 24, 1945, when the first pretense was made to advise appellant [R. Vol. III, pp. 1029-1030], although a few days later, on a motion to strike, the Court struck this testimony [R. Vol. III, p. 1246]. This did not cure the error of overruling the objection and did not erase from the minds of the jurors the impression the evidence made, as was said in the case of *People v. Bird,* 132 Cal. 261-264, with respect to such procedure:

> "* * * The practice, however, is one not to be commended, for there is inevitably some impression made and effect left upon the minds of the jurors."

This would be particularly true in a case where so many conversations were admitted and then one of them ordered stricken, without telling the jury what was contained in the conversation, so they could separate it in their minds from conversations that were not stricken.

Specification of Error No. 25.

This error is set forth in full in the Appendix. It was a motion to strike the testimony of witness PHOEBUS as to a conversation with the defendant, witness BIRCHER and others, in which testimony it was claimed the defendant had, in such conversation or conference, made many admissions against his own interests. The witness first testified as to what the defendant was told by Mr. BIRCHER about not having to answer the questions and then, by way of motion to strike and objection, the prior testimony as to what he was told, there was a motion to strike it as incompetent, irrelevant and immaterial and that no proper foundation had been made and that the evidence was not proper at that time, that there was no warning of the constitutional rights of the defendant, and

this objection was a running objection deemed to apply to each and every question concerning the conversation. What the witness said was told the defendant was that he didn't have to answer and *"in connection with another matter* he was told that anything which he said might come out later in open court in some subsequent Government proceeding." It was never told what *such other matter was.* He was told that they were there investigating or checking his income and was never told that what he might say would be used against him in connection with his income tax investigation and therefore the alleged admissions of the defendant were not "voluntary" and were not admissible for any purpose, but were wholly incompetent. Before such confessions can be admitted, the Government must prove that they were voluntary.

Braum v. United States, 168 U. S. 532, 18 S. Ct. 183;

O'Neill v. United States, 19 F. (2d) 322, at 325.

A confession is not voluntary, unless it is proven that it was made freely, voluntary, without having been induced by the expectation of any promise, benefit nor by the fear of any threatened injury.

Litkofsky v. United States, 9 F. (2d) 877;

Wilson v. United States, 162 U. S. 613, 40 L. Ed. 1090, 16 S. Ct. 895;

16 C. J. 717, Sec. 1468;

Braum v. United States, supra;

Hopt v. Utah, 110 U. S. 574;

Shaw v. United States, 180 Fed. 348;

Sorenson v. United States, 143 Fed. 820;

Jackson v. United States, 102 Fed. 473.

There was no proof in this case that the confession was freely and voluntarily made, as there was no proof that it was not induced by the expectation of any promised benefit, nor that it was not produced by fear, as was said in the case of *State v. Spanos,* 66 Ore. 118 at 120, 134 Pac. 6:

> "It is a fundamental rule of criminal law that a confession cannot be used against a defendant unless the prosecution can show its free and voluntary character action, *and that neither duress nor intimidation, hope nor inducement* caused defendant to furnish such evidence against himself." (Italics supplied.)

In the case of *State v. Dolan,* 86 N. J. Law 192, 194, 90 Atl. 1034, the Court held that a voluntary confession means—

> "A confession not extorted by any sort of threats or violence, or obtained by any direct or implied promises."

16 C. J. 725 lays down the rule as follows:

> "Confessions made by accused under the promise *or encouragement of any hope or favor made or held out to him by officers or other persons in authority,* or by a private person in their presence, are not voluntary, and therefore inadmissible, * * *." (Italics supplied.)

United States v. Pumphreys, 27 Fed. Case No. 16097, 1 Cranch. C. C. 74;

People v. Gonzales, 136 Cal. 666.

In addition thereto, there was not sufficient advice to defendant of his constitutional rights and they did not tell him that it would be used against him in any criminal prosecution of the character here involved, and there is

absolutely no proof that no promises were made, no threats were made or anything of that sort. It was incompetent until they did make such proof in accordance with the above authorities. In addition thereto, subsequently, Mr. BIRCHER was permitted to testify to this same conversation and as to what he told the defendant and as to what the defendant said, hereinafter cited as Specification of Error No. 44, in which Mr. BIRCHER testified that promises were made in this. We quote from his testimony:

> "* * * And he [referring to Mr. Ormont] asked specifically whether any statements he made to us might become knowledge available to certain other Government agencies. And I told him that normally any information given the Internal Revenue Department would be held in confidence by that department, but that if a criminal trial should follow, such information might be disclosed at any such trial; * * * He said he did not want to have any trouble; that he wanted to pay whatever was due the Government. * * *" [R. Vol. III, pp. 1136-1137.]

And on cross-examination Mr. BIRCHER testified:

> "Q. And at that time Mr. Ormont, *before making any statement of anything else asked you,* did he not, *whether or not anything he might say there would be kept in confidence by you and those present,* or words to that effect? A. *Yes,* he asked something of that kind." (Italics supplied.) [R. Vol. III, p. 1172.]

Here was not only an implied promise but an express promise that the Government would keep in confidence whatever Mr. ORMONT said. It further showed that he did not want any trouble and that he would pay anything that was due the Government. Thus, there must be the implied understanding that if the parties investigating

found that Mr. ORMONT was owing the Government any tax, that they would present him with the bill and there would not be any criminal prosecution. And this could be implied from the fact that at that time there was an announced policy by the United States Treasury Department to refrain from criminal prosecutions where the taxpayer made voluntary disclosures. See *United States v. Lustig,* 67 Fed. Supp. 306. In this instance, the witnesses present at said conference expressly promised that this information, if given them, would be kept in confidence and this all occurred *before* the defendant would make any statement, and it was only after receiving such promise that he made any statements and from then on, the defendant, according to all the witnesses, gave them full cooperation and told them repeatedly that if they found he owed any tax, to let him know and he would pay it, but he never was advised of any tax being due, but instead was first served with a warrant in this case. Also, this testimony was not admissible, because before it would become competent, it was necessary for the prosecution to first prove the *corpus delicti,* which was not done.

Further, where the Government introduces evidence of a confession, the burden is on it to establish the absence of duress in obtaining a confession before it is admissible.

Litkofsky v. United States, 9 F. (2d) 877;

Wilson v. United States, 162 U. S. 613, 40 L. Ed. 1090, 16 S. Ct. 895;

Martin v. United States, 254 Fed. 950;

Goff v. United States, 257 Fed. 294.

The foregoing argument applies with equal force to Specification of Error No. 41 which is the error of the Court in allowing witness BIRCHER to testify to this same

conversation with the defendant. Having objected to the testimony of the conversation by Mr. Phoebus, it was unnecessary to make an objection to the same evidence when asked of witness BIRCHER.

64 Corpus Juris 179, Sec. 201;
Salt Lake City v. Smith, 104 Fed. 457;
Moore v. Norwood, 41 Cal. App. (2d) 368, 369;
Balcom v. Grower's Warehouse, 55 Cal. App. 482.

Specification of Errors Nos. 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40.

These errors all relate to the same matter of objections and evidence and therefore will be argued together. They are set forth in full in the Appendix, pages 9-16. They consisted of objections to any and all testimony offered by Government witness WILLIAM S. MALIN, who was an accountant employed by an attorney, Mr. MIRMAN, who was then the attorney for Mr. ORMONT and Mr. HIMMELFARB jointly, and the nature of the questions asked of the witness referring to matters as to where the witness obtained information and from whom, and in general, his answers that he obtained the information from was said attorney and that he was employed by said attorney. Objections were all based upon the ground that all such matters were privileged and hence were incompetent and inadmissible. Specification of Error No. 32 was with respect to Exhibit 42, namely, a list of bonds. Specification of Error No. 33 was with respect to Exhibits 50-A, 50-B, 50-C and 50-D (originally referred to as 50). These various errors consisted of objections to any evidence concerning said Exhibits or to the introduction thereof in evidence and to the testimony of the witness as to mailing

the same on the grounds that all such exhibits were privileged and that there was no proof of authority from the appellant or said witness to mail the same. The salutory rule of keeping inviolate the communications between client and his attorney and agents, servants, stenographers and clerks, has been extended so as to include all the persons who act as the attorney's agents.

> Wigmore on Evidence, Vol. 8, 3rd Ed. Sec. 2301, p. 584.

The privilege extends to confidential communications by a client to a clerk or agent of the attorney and to the communications by the attorney to such agent.

> 70 Corpus Juris 501, Sec. 538;
>
> *Hawes v. State,* 88 Ala. 37, 7 So. 302.

The communications between an attorney and an accountant, whom he employed, are privileged.

> *Walshon v. Stainton,* 2 Hem. & M. 1, 71 Reprint 357.

On *voir dire* examination, Mr. MALIN testified that it was Mr. MIRMAN, attorney for Mr. ORMONT and Mr. HIMMELFARB, who employed him in connection with income taxes [R. Vol. III, pp. 1100-1101] and that he took all of his directions from Mr. MIRMAN [R. Vol. III, p. 1095]. This would render him in a confidential relation and would preclude him from giving testimony or from the testimony being extracted from him over objection of privilege which was duly interposed, and applied to all forms of communication whether they be in the forms of

writings or oral communications or whether they be letters.

70 Corpus Juris 376, Sec. 497;
70 Corpus Juris 388, Sec. 521;
Bowman v. Patrick, 32 Fed. 368;
New York Life Insurance Co. v. Ross, 30 F. (2d) 80;
Brown v. Brown, 53 Mo. App. 453;
Continental Casualty Co. v. Vines, 201 Ala. 486, 70 So. 392;
State v. Foster, 164 La. 813, 832, 114 So. 696.

Under the foregoing rule, any person in such confidential relation is by law precluded from divulging any such information, whether written or oral, received in confidence and which is privileged. Therefore, the burden was upon the Government in this case to prove whether the privilege had been waived by the defendant or that he had authorized Mr. MALIN to transmit the writings, Exhibits 50, 51-A, 51-B, 51-C, 51-D and 51-E, to someone else. Otherwise, they were not properly admissible in evidence. No such proof was offered and the objections should have been sustained to each and every one of said exhibits and to each and every one of the questions propounded to the witness.

Specification of Error No. 43.

This Specification of Error is set forth in full in the Appendix on pages 17-18. It consists of a motion to strike all of the testimony of witness BIRCHER as to conversations and transactions occurring after May 24, 1945, on the ground that on that day the defendant was threatened with prosecution for destroying Government property, and thereafter acted under fear and anything that

he said or did was not done voluntarily and was done with such fear, and that acting under such fear he thereafter submitted his books and records to the Internal Revenue Department under the understanding that all matters would be kept confidential, and that if it was found that he owed any tax that they would permit him to adjust the same by payment. This confidence was breached by the agents who submitted their reports to the United States Attorney and to the Grand Jury, without the slightest warning to defendant or without advising the defendant that the Government claimed that he would owe any additional tax or giving him any opportunity to adjust the matter by paying according to the rules of the Treasury Department. The fear is shown by witness BIRCHER's testimony that defendant repeatedly apologized for what had happened the day before, pertaining to the affidavit and asked him what he could do to straighten it out, and on the day before Mr. BIRCHER had told him the matter would be gone into further, thereby placing the defendant under fear [R. Vol. III, pp. 1145-1146].

Specifications of Errors No. 48 and 49.

The Court erred in denying appellant's motion for an acquittal on all counts of the indictment made at the close of plaintiff's evidence on the ground of insufficiency of the evidence [R. Vol. III, pp. 1252, 1256-1257; Vol. IV, pp. 1627, 1640, Point 18].

The Court erred in denying appellant's motion for acquittal on Count I at the close of all evidence on all the grounds stated in the motion for acquittal at the close of plaintiff's evidence and including the ground of "once in jeopardy", in response to which the Court said:

> "The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to

> Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4.
>
> * * * * * * * *
>
> "I will grant the motion for a judgment or acquittal as to Counts 3 and 4, as to the defendant Sam Ormont; and the case will go to the jury as to the defendant Sam Ormont, on Count 1 only." [R. Vol. IV, pp. 1367, 1369, 1374.]

The above motion under Specification of Error No. 49 shows that the judge conceded that he had made an error in not granting the prior motion made at the close of plaintiff's evidence and assigned as Specification of Error No. 48, as to Counts III and IV. Before granting the motion as to Counts III and IV, the Court said:

> "The Court: On Count 1 I am satisfied that I should grant it. I was somewhat in doubt as to Counts 3 and 4, as I previously indicated, and was not too firmly of the conviction that my conviction was correct as to Counts 3 and 4." [R. Vol. III, p. 1369.]

And in granting the motion at the close of all evidence, the Court used this language:

> "But, on Counts 2 and 3, the whole case is built up by an arbitrary accounting method used by the Government agent. * * * I mean in the sense that he takes a figure and says, 'This is it.'
>
> * * * * * * * *
>
> "The Court: You can't take a person's books, and total his bank accounts, and reach a conclusion, and say that that is unexplained, as you can maybe in a

civil case, where you can weigh the evidence only by the preponderance rule, and would be entitled to judgment. But this is a criminal case." [R. Vol. IV, pp. 1370-1371.]

And in answer to Mr. Strong's argument as follows:

"Mr. Strong: Your Honor, there are only some sources from which a person gets money. He either earns it as income, or takes it in as a loan, which he has got to repay, or gets it from somewhere else, which he won't explain. That is also income.

The Court: Which he won't explain—there is a difference. If that were the case, there is another crime here, *which these defendants have not been charged* with—refusing to give evidence, or something like that. They might have charged him with the crime of refusing to give the information, but that is a different offense." (Italics supplied.) [R. Vol. IV, pp. 1372-1373.]

The Government agent, Mr. Eustice, referred to by the Court as using an arbitrary accounting method as to those Counts, testified as to Count I (1944):

"The Witness: The same method of accounting for all the funds of the taxpayer was used in this case [1944] as in 1943 and in 1942. * * *" [R. Vol. II, p. 549.]

Therefore, it should follow, that the motions to acquit on Count 1 should have been granted because, without Mr. Eustice's testimony, there was absolutely no proof of the *corpus delicti* and, of course, that testimony being such as the trial judge labeled as "insufficient" was not sufficient proof of the *corpus delicti* and the Court erred in not granting such acquittal on Count I. This is fur-

ther demonstrated by the evidence of witness EUSTICE himself, who testified that as to 1944 he arbitrarily took as unreported income for that year $19,257.76 [R. Vol. II, pp. 860, 868]. In the Record, at page 860, the witness said that he took $19,257.76 from the Joint Venture Return" [Exhibit 6] and set it up as unreported income for 1944 and it was that figure so arbitrarily taken, plus the figure of $5,550.19, which he had taken as unexplained money in the purchase of bonds (appellant explained in his testimony that it was savings of previous years) [R. Vol. IV, p. 1310] that made up his calculation of unreported income for 1944 of $24,807.95. And on page 868, the witness said, in trying to explain something to the Court:

> "* * * I took into account this sum of $19,257.76. I don't know of my own knowledge where it came from. * * *"

There was no evidence as to any such income during 1944. The joint venture return ran from May 1, 1944, to April 30, 1945, and in no way showed when the $35,000.00 was received—whether received mostly or all in 1945 or part of it in 1944. Exhibit 53 does not sustain any such assumption. The most that is indicated in eight months of 1944 and five days of 1945 was a little less than $12,000.00 received from the joint venture by this appellant. How much was actually received in 1944 is not there shown, but, in any event, it is far cry from the 24,000 odd dollars which the witness claimed as unreported income for 1944 and which was charged in the indictment and this again did not prove the *corpus delicti*. The witness was using declarations from the defendant in his joint venture return which, under the law, could not be used

to establish the *corpus delicti,* and without that joint venture return, the witness did not and could not have testified concerning the 19,000 odd dollars. This was not competent proof whatsoever of the charge in the indictment and if the Court subsequently charged the jury correctly, the Government could not prove a case without proving "substantially the sum alleged as taxable income" in the indictment for the year 1944, which sum so alleged was over $24,000, and even if it be considered that the witness' testimony was anything more than assumption as to the 5,000 odd dollars, part of which he said was taken as the money purchasing bonds that he could not trace, and assuming that that was income that was unreported, it certainly would not be substantially the sum alleged in the indictment and under the authorities it would be the duty of the Court to acquit the defendant on that point alone.

Tinkoff v. United States, 86 F. (2d) 868 (7th Cir.);
Hargrove v. United States, 67 F. (2d) 820;
Gleckman v. United States, 80 F. (2d) 394;
United States v. Schenck, 126 F. (2d) 702.

See, also, authorities heretofore cited under VARIANCE, particularly 42 Corpus Juris Secundum 1273, Sec. 254, holding that the proof must correspond to the allegations or there is a variance.

There was no evidence that the defendant's place of residence was in the judicial district of the trial court, namely, the Southern District of California, Central Division, nor that the defendant was under obligation to file any tax return in that District or to pay any taxes there or that any taxes were due in that District. These were necessarily elements to be established by the prosecution

in order to make out a case and without such evidence from which the jury could so find, it was not proper to submit the matter to the jury.

Price v. United States, 66 F. (2d) 133, cert. den. 54 S. Ct. 644.

There was no substantial evidence of the necessary facts in this case. The Court should have granted the motion for acquittal.

Edmonson v. United States, 7 F. (2d) 357;
Wright v. United States, 127 Fed. 866.

"It has been held by a long line of decisions that unless there is substantial evidence of facts which exclude every other hypothesis than guilt, it is the duty of the trial judge to acquit the defendant, and where all the evidence is as consistent with innocence as it is with guilt, it is the duty of the appellate court to reverse a judgment against the accused."

Gonzales v. United States, 40 F. (2d) 852, 853;
Woods v. United States, 72 F. (2d) 790, 796;
Wolfe v. United States, 153 F. (2d) 370, 372-373;
Simmons v. United States, 282 Fed. 373, 378;
United States v. Williamson, 77 F. (2d) 357, 360;
Chisholm v. United States, 146 F. (2d) 424, 426.

Specification of Errors No. 50 and No. 51.

The Court erred in denying appellant's motion made immediately after the Court had acquitted the defendant Sam Dawson on Counts III and IV (income for 1942 and 1943), reading as follows:

"Mr. Bonnett: Your Honor, under those circumstances, I now move to strike all of the testimony and the evidence given by the witness Eustice, as to

the years 1942 and 1943, upon the ground that it is incompetent, irrelevant and immaterial, and prejudicial, if it is allowed to remain in before the jury, as to 1944." [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22.]

The Court erred in denying the motion immediately following the above motion and based upon the same grounds to strike all the evidence of witness LINK, pertaining to the years 1942 and 1943 [R. Vol. IV, pp. 1374, 1629, 1640, Points 21 and 22].

After the Court acquitted the defendant on Counts III and IV, covering the years 1942 and 1943, thereby finding the defendant "not guilty" of the charges as to those two years, appellant's counsel immediately moved, by separate motions, to strike all the testimony of witness EUSTICE, pertaining to those two years, on the ground that they thereby became incompetent, irrelevant and immaterial and had no place in the record and the jury had no right to consider them for any purpose, and a like motion, as to the testimony of witness LINK as to those years. The Court denied these motions which are assigned as errors and relied upon on this appeal. In denying the motions, the Court said that he would allow such evidence to remain in on the question of "intent or wilfulness." This was prejudicial error. Before evidence of the commission of other crimes by accused is admitted, the trial court should satisfy itself that the evidence substantially establishes the other crimes with clear and convincing proof.

22 Corpus Juris Secundum 1112, Sec. 690, and cases there cited, including *Gart v. United States,* 294 Fed. 66 (C. C. A. Colo.).

This Honorable Court, in the case of *Souza v. United States,* 5 F. (2d) 9, 11, held:

> "The fact that an unproven charge has been made against one does not tend logically to prove guilt of an offense."
>
> *Paris v. United States,* 260 Fed. 529 (C. C. A. Okla.);
>
> *Fabacher v. United States,* 20 F. (2d) 736.

In the *Paris* case, *supra,* it was held that before guilty intent may be inferred from other similar crimes, they must be established by evidence which is legal and competent and plain, clear, and conclusive.

Such evidence tends to draw the attention of the jury away from a consideration of the real issues on trial, to fasten it upon other questions, and to lead them unconsciously to render their verdicts in accordance with their views on false issues rather than on the true issues on trial.

> *Fish v. United States,* 215 Fed. 545, 549, 132 C. C. A. 56, L. R. A. 1915A 809.

The Court there said:

> "Evidence of this character necessitates the trial of matters collateral to the main issue, is exceedingly prejudicial, is subject to being misused, and should be received, if at all, only in a plain case."

In consideration of this erroneous admission of testimony which was prejudicial to the defendant, the judgment of the trial court will be reversed, and the case remanded for a new trial.

> *Farkas v. United States,* 2 F. (2d) 644;
>
> *Weil v. United States,* 2 F. (2d) 145.

In this case, as we have shown, the Court has held by its acquittal that the alleged other offenses were never committed and the defendant was not guilty of them. Therefore, there was no evidence which should have gone to the jury. Therefore, it was prejudicial error to allow that evidence to remain before the jury. The evidence of witness EUSTICE covering the years 1942 and 1943 covered practically 500 pages of transcript, as most all of the direct and cross-examination covered those two years (his testimony is found starting on page 507 and ending on page 1014) and most all of the exhibits pertained to those two years and were introduced by the Government on the one hand, as to its exhibits, and the deefndants on the other, as to his exhibits, during the examination of this witness, and it was this evidence and these exhibits which were repeatedly referred to by Government attorney STRONG during his arguments to the jury, as we have hereinafter cited [R. Vol. IV, pp. 1456-1459].

To leave this voluminous evidence before the jury could do nothing but confuse and warp their judgment, as was said in the case of *People v. Albertson,* 23 Cal. (2d) at 580, 581, where the Court was there reversing a case where evidence had been allowed as to other offenses and which evidence was insufficient to prove such other offenses:

> "Here, the fact that the circumstantial evidence of the prior merely suspicious occurrences was adduced *in great quantity so that it comprises a large part of the voluminous record,* cannot serve as a substitute for 'substantiality' where none exists. *This errone-*

> *ously admitted proof shows,* if anything, *that it must by very reason of its voluminousness have tended to confuse the jurors and warp their judgment.* Circumstantial proof of a crime charged cannot be intermingled with circumstantial proof of suspicious prior occurrences in such manner that it reacts as a psychological factor with the result that the proof of the crime charged is used to bolster up the theory or foster suspicion in the mind that the defendant must have committed the prior act, and the conclusion that he must have committed the prior act is then used in turn to strengthen the theory and induce the conclusion that he must also have committed the crime charged. This is but a vicious circle. * * *" (Italics supplied.)

As to Mr. LINK's testimony, more was addressed to those two years than to 1944 and the Court, as to this witness, said:

> "* * * I may be pardoned for saying this, but if I had to weigh Mr. Link's testimony I wouldn't give it much credence, * * *." [R. Vol. III, p. 1260.]

With this vast amount of testimony and exhibits left in before the jury, which at best was only confusing and which certainly had no place therein, after the acquittal on those two counts, and Government's counsel's argument referring to the great mass of evidence was sufficient in itself to prejudice the jury against the defendant, notwithstanding the acquittal by the Court on those counts and on that evidence, but by leaving the evidence before the jury and then instructing them as he did that they might consider it on the matter of intent, there can be no question but what that fact alone influenced the jury and caused a miscarriage of justice herein.

Specifications of Errors No. 14, No. 15 and No. 53.

These Specifications of Error will be considered together and are set forth in full in the Appendix attached hereto, pages 19-28. These errors consist of prejudicial misconduct of the District Attorney in his argument to the jury.

Error No. 14 consisted of the misconduct of the District Attorney in the examination of witness LINK, wherein he repeatedly attempted to elicit from said witness incompetent and improper evidence, by asking repeated questions, after objections had previously been sustained or the previous answers had been stricken. We set forth the record in the Appendix, attached hereto, beginning at page 441 and ending at page 446, which shows the prejudicial effect of this conduct, even though the Court did strike the answers. The matter got before the jury and the mere striking of the answers after was insufficient to erase the detrimental effect from the memory of the jury.

The error is that the United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer.

> *Berger v. United States,* 295 U. S. 78, 89, 55 S. Ct. 629, 632.

Public interest requires that it is the duty of the Court, on its own motion, to protect the rights of the defendant,

and procedural niceties will not preclude the Court from correcting errors.

Berger v. United States, supra;
N. Y. Central R. Co. v. Johnson, 279 U. S. 310, 318, 49 S. Ct. 300;
Etzel v. Rosenblum, 83 A. C. A. 954-957.

Even though the Court may have correctly ruled upon objections, after the rulings were made or after the mischief had been done, it doesn't remove the error and where there is a pronounced and persistent repetition of an attempt to introduce improper evidence, this in itself would be misconduct.

Berger v. United States, supra.

A single misstep on the part of the prosecutor may be so destructive of the right of a defendant to a fair trial that reversal must follow.

Pharr v. United States, 48 F. (2d) 767 (C. C. A. 6);.
Pierce v. United States, 86 F. (2d) 949.

The misconduct in the arguments consisted of repeated argument and statement to the jury containing misstatements of the evidence, and stating that the cross-examination of witness EUSTICE was based entirely upon hypothetical questions and that there was nothing in the records to show that the facts based therein were true, but that all such things were purely suppositions or assumptions, and further stating that the witness EUSTICE did not use a single one of the checks in evidence as various exhibits in determining the unreported income which the Government claimed in the indictment. This was repeated many times, as is shown by the Specification of Error No. 53, set forth in the Appendix pages 20-28, and counsel re-

ferred to all such checks and all evidence in cross-examination as merely brought in to confuse the jury and had absolutely nothing to do with the case. To demonstrate the validity of this argument, witness EUSTICE identified a check of $186 and said he did take it into account as unexplained income [R. Vol. II, p. 678], and he also identified a great list of checks that he took into account as unexplained income [R. Vol. II, pp. 690-691] and another check that was taken into unreported income [R. Vol. II, p. 693]. Testifying concerning Exhibits S and T, S being a check for $1,332.27 to reimburse Mr. ORMONT for the checks embraced in Exhibit T, the witness said that he did not give credit for said sum as applying on the purchase of bonds, but instead charged that amount and more as unreported income [R. Vol. II, pp. 779-780]. He admits that if Exhibit S was used to purchase bonds, that would change his calculations as to the amount of unexplained income [R. Vol. II, p. 785]. Although the District Attorney said there was no proof as to any of these items, the defendant testified positively that this $1,332.27 was used by him to purchase bonds [R. Vol. IV, p. 1303]. As to Exhibit Y, EUSTICE admitted that he did take it into account in determining the unreported income [R. Vol. II, pp. 822-823]. Yet the District Attorney told the jury that EUSTICE didn't take any of these checks—not a single one of them—into account and that there was no evidence that any of them were used to purchase bonds. Yet the undisputed testimony of appellant that these checks in Exhibit Y were used to purchase bonds [R. Vol. IV, pp. 1300-1301]. As to Exhibit Z, EUSTICE admitted that he gave no credit for that check on the purchase of bonds, but charged the entire amount of the bonds to unexplained income and did use it in the

calculations [R. Vol. II, pp. 793-794]. Mr. ORMONT testified postively that this check was used to buy bonds [R. Vol. IV, pp. 1300-1321].

The foregoing subsequently shows the falsity of counsel's repeated statements to the jury that there was nothing in the record to show that any of these checks were taken as income or that, in fact, they were used to purchase bonds. Every single check and exhibit that were introduced by the defendant were used by EUSTICE in arriving at his arbitrary conclusion of unreported income. Many of them he arbitrarily charged up to defendant as being used for living expenses, thereby enabling the witness to say that the purchase of certain bonds could not be traced by him [R. Vol. II, pp. 824-825]. He was asked as to a $800 item whether he considered it in his calculations as available to purchase bonds and he said no, he charged it to personal expenses. On page 825, the Court said:

> "The Court: In other words, if you couldn't trace the money to bonds or to some place else you said, well, that is living expenses?
>
> The Witness: Yes, that is available.
>
> * * * * * * * *
>
> The Court: So if they were used, however, for the purchase of bonds you would have to revise your figures, wouldn't you?
>
> The Witness: That is exactly right, your Honor."

And this was the general nature of his testimony throughout, showing the arbitrary method used to try to show that there was unreported income. The District Attorney's misstatement to the jury is also corroborated by the fact that the Court himself, after this cross-examination and after the evidence of Mr. ORMONT as to

the use of these various checks, found the defendant "not guilty" on Counts III and IV, to which most of the checks pertained. In other words, this evidence that the District Attorney branded as the "red herring" and of the extra pieces of the jig-saw puzzle and as matters drawn in by the defendant for confusion only were indeed the very things which were, on the contrary, very pertinent evidence, so pertinent that the Court labeled the Government's case as having been built up on an arbitrary method of accounting.

Counsel misstated to the jury "And besides that Mr. Malin himself, with information which he told you he got from the defendant Ormont, prepared net worth statements * * *." [R. Vol. IV, p. 1478.]

There is no record—on the contrary, the witness testified that he got the testimony from the taxpayer's records [R. Vol. III, p. 1120]. Counsel told the jury that all they had to prove was a *"substantial amount of money as unreported income."* This is a misstatement of the law and was misconduct and misleading, as they were required to prove substantially the amount they alleged in their indictment, not merely a substantial amount of money. Counsel misled the jury with regard to bonds for he said that they would find some $50,000.00 worth of bonds bought in 1943 and supposing Mr. ORMONT did have $8,000.00 cash from savings that that would leave $42,000.00 unexplained. This is not the record. As his own witness EUSTICE testified, on counsel's own examination, he found the source of the purchase of $37,390.24 worth of said bonds [R. Vol. II, p. 540], and that the only part of the bonds which was "unexplained" was $14,-084.76. Yet counsel states to the jury that except as to the $8,000.00 of the $50,000.00 worth of bonds, there was

no explanation as to where the money came from. Such various statements by the United States Attorney, repeated and repeated to the jury, certainly constituted misconduct and reversible error. Counsel knew that unless he could prejudice the jury against the defendant and his counsel and misstate the evidence that he produced that he could not hope to get a verdict. [R. Vol. IV, pp. 1476-1477.]

This argument, based upon the 1942 and 1943 evidence, demonstrates the error committed by the Court in denying the motions to strike the testimony of Mr. EUSTICE as to said years (Specifications of Error No. 50 and No. 51). Counsel, in referring to the testimony of Mr. LINK, with respect to certain 1942 invoices, stated "that is some more money that isn't on the books, some more money unreported." There is no evidence that it wasn't on the books. LINK testified that he never checked the books as to these invoices. All his testimony was that he didn't enter them, basing his testimony upon the fact that they didn't bear his identification mark [R. Vol. I, p. 417]. Counsel stated that because Mr. ORMONT told Mr. LINK to change some figures on the books that that was falsifying his records. The testimony of LINK himself showed that the change made was of additional money that was actually paid on the purchase of cattle and the Court remarked, "So that the books were accurate when it said that he spent $3000 more?" Further than this, this error was deliberate, because during the trial, in the presence of the jury, and while the examination of this witness was on this very item, the following occurred:

> "Mr. Strong: It proves that the records are false.
>
> The Court: Government counsel's statement to the jury will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel." [R. Vol. II, p. 504.]

This is assigned as Specification of Error No. 15. And yet, although counsel at that time was warned that such statement was not justified and should not have been made to the jury, nevertheless he repeats it to the jury in his argument, and, in addition, it was a untrue statement by counsel, rather than false records.

Counsel also said to the jury:

"* * * The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case."

Thereby telling the jury that the books were in evidence, which was false. They never were in evidence, nor were they ever produced in Court. Counsel also said:

"* * * Why didn't they put Mr. Malin on the stand to tell you about it then? * * * They didn't put Mr. Moody on, they didn't put Mr. Malin on." [R. Vol. IV, pp. 1559, 1560, 1561.]

The Record in this case shows that Mr. MALIN was a Government informer and his testimony shows that he was adverse to the appellant and this argument of counsel was therefore misconduct.

People v. DePaulo, 23 N. Y. 39, 138 N. E. 498;
People v. Swift, 319 Ill. 359, 150 N. E. 263;
Lowrey v. State, 21 Ala. App. 352, 108 So. 351;
People v. Munday, 280 Ill. 32, 117 N. E. 286, 292.

The cases hold that where witnesses are equally accessible to the prosecution, the prosecuting attorney has no right to comment on the failure of the defendant to put them on the stand.

These miscalculations and misstatements and misconduct assigned could not help but have serious influence with the jury, as they recognize that the prosecutor holds a position of importance and that lends weight to his utterances, as was held in the case of *Latham v. United States,* 226 Fed. 420, 425. Even though objections or assignments were not made at the time, where errors are seriously prejudicial, appellate courts will consider them and correct them.

Skuy v. United States, 261 Fed. 320.

And where the District Attorney is guilty of misconduct, the Court should of its own motion interrupt and correct it.

23 C. J. S. 594, Sec. 1112;

Pierce v. United States, 86 F. (2d) 949.

It is the duty of the District Attorney to treat the accused in a fair and impartial manner, and this applies to his argument to the jury.

Tahaffero v. United States, 47 F. (2d) 699 (9th);

23 C. J. (2d) 540, Sec. 1090;

Ryan v. United States, 99 F. (2d) 484.

Specification of Error No. 65.

The Court erred in refusing to give the following instruction requested by the appellant to the jury:

> "It is a recognized principle of our system of law that in order to convict a defendant, the facts proven must not only be consistent with the theory of guilt, but inconsistent with any reasonable theory of innocence, and this I charge is the law." [R. Vol. I, p. 93.]

No grounds were assigned for the reason that the court stated he was giving his own instruction, which fully cov-

ered the matters embraced in the above instruction, but his instructions, when given, did not, in our opinion, so cover the same.

In a case where circumstantial evidence is relied upon by the prosecution, it is error to refuse a requested instruction or to fail to include in the instruction given a proper statement of the principle to justify a conviction. The facts or circumstances must not only be consistent with each other and with the conclusions sought to be established, but all the facts and circumstances must be inconsistent with any reasonable theory of the innocence of the defendant, and such facts and circumstances, taken altogether, must be of such conclusive and satisfactory nature as to produce in the minds of the jurors a reasonable and moral certainty that the defendant on trial committed the offense charged. In the case of *People v. Koenig,* 29 Cal. (2d) 87, the Supreme Court held that an instruction to the above effect was improperly refused.

Specification of Error No. 71.

The Court erred in its charge to the jury as follows:

> "The law under which these defendants were indicted in substance provides, as is applicable to this case, that any person who wilfully attempts in any manner to evade or defeat any tax shall be guilty of a crime. The pertinent portion of the statute provides as follows:
>
> > " 'Any person required under this chapter to account for, and pay over any tax imposed by this chapter, who wilfully fails to truthfully account for any and pay over such tax, and any person who wilfully attempts in any manner to evade or defeat any tax imposed by this chapter or the payment thereof, shall, in addition to other

> penalties provided by law, be guilty of a felony and, upon conviction thereof,' shall be punished in the manner provided by law." [R. Vol. IV, pp. 1574-1575.]

This was objected to [R. Vol. III, pp. 1407-1408].

The foregoing instruction was erroneous—firstly, there was no evidence in this case that SAM ORMONT was a resident or required to report or pay any income tax within the jurisdiction of said court or that he was one of the class required to file a return or pay tax.

Anderson v. United States, 11 F. (2d) 538.

The Court further tells the jury that the law, as is applicable to this case, is that any person who wilfully attempts "in any manner" to evade or defeat any tax, etc. That was improper, because the indictment in this case alleged the manner, and in so doing, limited the case to that which was alleged, namely, (1) the filing of a false income and victory tax return and (2) concealing from the Collector and other officers of the United States a true and correct gross and net income and the sources thereof. These were the only "manners" involved in this case. Yet the Court told the jury, in effect, that they could find the defendant guilty if he attempted to evade any tax "in any manner", which would allow them to go outside the indictment and find the defendant guilty not on the charges in the indictment as to the manner, but on some entirely different manner, as for instance, not keeping books. The Government, having elected by their indictment to charge the defendant with the manner or means, are thereby compelled to prove those allegations and those only, and they were not entitled to a verdict on something else. See the many authorities hereinbefore cited under Error No. 1, pp. 104-114.

Specification of Error No. 74.

The Court erred in the following charge to the jury:

> "In the event that you find that either defendant as to the particular count failed to report his true income in the amount substantially as claimed by the Government for the calendar year 1944, then as matter of law the tax for the calendar year 1944 would have been substantially more than paid by such defendant for the calendar year 1944." [R. Vol. IV, p. 1578.]

The above charge was never served on or submitted to appellant's counsel. Hence, no opportunity to except. See exceptions to Errors Nos. 62-66, inclusive [R. Vol. IV, pp. 1402-1406, 1438-1439].

This instruction was erroneous and misleading for the reason that it told the jury that if they found that either defendant failed to report his true income in the amount substantially "as *claimed* by the Government." The Government was represented by Mr. Strong, and in his argument to the jury, he claimed that all that was necessary for the Government to prove was a "substantial amount" and said that $11,000.00 was enough [R. Vol. IV, pp. 1551-1552]. This was not as charged in the indictment, which was over $24,000.00 Under the law, it was the amount charged in the indictment that they must substantially prove, and this instruction, by using the word "claimed" instead of "alleged", was misleading to the jury, as they were not reading the indictment, but were listening to the prosecuting attorney and what he said and could well have been misled by this instruction.

Specification of Error No. 76.

The Court erred in the following charge to the jury:

> "The Internal Revenue regulations, which have the force of law, provide that the type of books *and* records which must be kept in this connection to allow the filing of a return on a fiscal year basis, are books *and* records which contain entries which are sufficient to establish the amount of gross income and the deductions, credits and other matters required to be shown in returns, and that such books *and* records shall be kept at all times available for inspection by Internal Revenue officers and shall be retained so long as the contents may become material in the administration of any internal revenue law.
>
> "If no books or records of the type required by law are kept, a fiscal year return cannot be filed, but the sums *earned* must be reported upon the calendar year return for the year in which they were earned." (Italics supplied.) [R. Vol. IV, p. 1583.]

No special exception was taken for the reason that counsel assumed that Government counsel had truthfully stated the regulations, but he did not, as they did not require the keeping of books *and* records and do not state that if none were kept, the income must be reported in the year *earned.*

The foregoing instruction was erroneous for two reasons—firstly, it was not a correct statement of the regulation in that, in effect, it said that the taxpayer must keep "books *and* records" in order to file a fiscal year return, whereas the regulation says he must keep "books *or* records." Further than that, the Court, in the last paragraph of the above-quoted instruction, told the jury that sums "earned" must be reported upon the calendar year

return for the year in which they were "earned". This is not a correct statement of the law, as a taxpayer, who is on a cash basis, is not required to report any income until it is actually "received" even though it was "earned" in a given year. If it was not so received in that year, he is not required to report it, yet the jury was told here that they might determine that the defendant "earned" certain unreported income in 1944 and if they did, that the law exacted that he should report it for that year whether he had received it or not. This instruction is also inconsistent with and in conflict with the instruction on page 1584 of the Record, reading as follows:

> "A taxpayer who is on a cash basis need not report any income on his return that may be due him *until he actually receives the said cash income.*" (Italics supplied.)

It is reversible error to give a jury conflicting and inconsistent instructions on one material point, as they are misleading and it is not for the jury to determine which one is correct and no way for an appellate court to determine which one was followed by the jury.

Nicola v. United States, 72 F. (2d) 780;
People v. Valencia, 43 Cal. 552;
People v. Ross, 19 Cal. App. 469, 473-474;
Noce v. United Railroads, 53 Cal. App. 512 at 519;
23 C. J. S. 895, Sec. 1307, and authorities cited in Notes 38, 40 and 41.

In the case of *People v. Valencia, supra,* where conflicting and contradictory instructions were given, the Supreme Court held that they could not disregard such conflict and determine that there was no error, even though

the Court was satisfied that the jury ought to have found the defendant guilty. To the same effect see:

People v. Wong Ah Ngow, 54 Cal. 154;

People v. Messersmith, 57 Cal. 575.

In the case of *People v. Ross, supra,* the Court, in reversing the case, said:

> "* * * Moreover, instruction No. 15, clearly in conflict with instruction No. 14, was well calculated to, and no doubt did, prevent the jury from giving due or any consideration to the evidence in the light of instruction No. 15. * * *"

In the case of *Guthrie v. Carney,* 19 Cal. App. 145, 155 (cited with approval in the case of *Noce v. United Railroads, supra*), the Court said:

> "It being impossible to tell which of the several conflicting instructions controlled the verdict of the jury, a material error in any one of them must be deemed to be prejudicial. * * * (Citing several cases)."

The jury, in the case at bar, might have determined that Mr. Ormont, during the year 1944, "earned" income which he did not report, although he did not "receive" the same until 1945. Nevertheless, under the criticized instructions above, the jury, by following the same, could have and probably did determine this defendant guilty, whereas if they had been asked the specific question as to when he "received" the income, their answer to that might have been in a totally different year, in which event he would have been entitled to a verdict of "not guilty".

Specification of Error No. 78.

The Court erred in failing to instruct the jury on his own action that the jury might find the appellant guilty of a lesser offense embraced within the charge in the indictment, namely, a misdemeanor under Section 145(a), I. R. C.

It was the duty of the Court, on its own motion, to fully and fairly instruct the jury on all the law relating to the facts of the case and the Court is not relieved of this duty to give instructions whose necessity is developed as to the evidence introduced at the trial, such as instructing the jury of a lesser offense embraced within the greater, instructing them as to admission of confession and the necessity of independent proof of the *corpus delicti* and testimony of expert witnesses, the manner of considering it.

Kinard v. United States, 68 App. D. C. 250, 96 F. (2d) 522, 523;

People v. Putnam, 20 Cal. (2d) 885, at 890, 891;

Kreiner v. United States (2 Cir.), 11 F. (2d) 722, 731;

People v. Best, 13 Cal. App. (2d) 606;

18 U. S. Code, Sec. 565.

The defendant is entitled to rely upon the District Attorney to submit the proper instructions.

People v. Best, supra.

The evidence in this case warranted the giving of such other instructions. As the matters set forth in Count I of the indictment were specifically made misdemeanors under (a) of Section 145, I. R. C., and had the jury

been instructed that they might have found the defendant guilty of a misdemeanor, they might have so found rather than the verdict that they did find, and these instructions as to a lesser offense should be given, even though there is evidence to warrant a conviction of the greater offense:

Hawkes v. State, 51 Ga. App. 317, 180 S. E. 363.

Specification of Error No. 52.

Prejudicial error was committed by the Government, causing a Deputy United States Marshal to come into open court, while Court was in session, in the presence of the jury, and serve the defendant ORMONT with a subpoena *duces tecum* to produce his books and it was assigned as prejudicial misconduct [R. Vol. II, pp. 805, 808]. After the counsel called the matter to the Court's attention, they then made this motion [R. Vol. III, p. 890]. The Court remarked that the Deputy Marshal was not only a lady, but a good looking lady. Hence, the jury must have noticed her serve the defendant.

It is error to call upon a defendant in a criminal case, in the presence of a jury, to testify or produce documents against his will, although he makes no objection thereto.

14 Encyclopaedia of Evidence 646, 647;

McKnight v. United States, 115 Fed. 972, 54 C. C. A. 358;

State v. Merkley, 74 Iowa 695, 39 N. W. 111;

Gillespie v. State, 5 Okla. Crim. 546, 115 Pac. 620 (Ann. Cas. 1912, p. 259).

In the *Gillespie* case, *supra,* the Court said:

> "When such a demand is made, a defendant must accept the alternative of either producing the letters, and thereby incriminating himself, or of having the jury place the strongest possible construction against him upon his failure to do so. If this can be done, the very life, body, and soul of the Constitution would be violated and trampled upon."

Prior to this incident and while the prosecution was attempting to introduce evidence from the books and records, as against the defendant HIMMELFARB, an objection was raised as to the books being the best evidence and anything else would be hearsay. The prosecuting attorney first tried to lay a foundation by asking witness EUSTICE if he had the books and records, to which he said he did not and where he last left them, and then the following transpired:

> "Mr. Strong: We don't have those books and records, your Honor, but we have some computations which the witness made from them.
>
> Mr. Katz: Neither do we, your Honor.
>
> The Court: I cannot help it. It is still hearsay. Unless you produce the books and records here from which they are made so that the parties themselves may examine them and the jury, if they desire, may look at them.
>
> Mr. Strong: They are not available to us, your Honor. I don't want to state the reasons in court.
>
> The Court: There are processes of the United States Government to use and you have the processes of this court.
>
> Mr. Strong: Does your Honor suggest that I could use that process in a criminal case as to these books without going further into the books?

The Court: I am not suggesting anything. I am just reminding you that the law is here. Here is the body of the law which you can avail yourself of. I am not saying in advance whether you can correctly or properly do so, but I am saying that you cannot produce a witness on the stand who has gathered information from books which are not here and which the parties do not have available to examine and which the jury can see. Otherwise it is the rankest kind of hearsay.

Mr. Strong: I know it is a little early, but may I ask that your Honor adjourn at this time so that I can attempt to secure these books and records" [R. Vol. II, pp. 599-600.]

All the foregoing transpired immediately in the presence and hearing of the jury and it was prejudicial misconduct by the Court, as well as the District Attorney, and this, connected with the fact that at a later time a Deputy Marshal comes into open court and serves this subpoena on ORMONT, would most certainly leave an unfavorable impression on the minds of the jurors. The Court said, at page 806 of the Record, of the act of the Deputy Marshal, so serving said subpoena:

"The Court: *It is highly improper, certainly, for the Marshal to come in here and hand the defendant any document in the presence of the jury.*" (Italics supplied.)

Although the District Attorney denied that the Marshal was told to do so, it was he, the District Attorney, who obtained the subpoena and, without any order from the trial judge, delivered it to the Deputy Marshal to be served on the defendant and under the authorities we certainly contend that it was gross misconduct and prejudicial error.

Other Assigned Errors Relied Upon.

Neither the space nor the time allotted us will permit us requoting and arguing all of the 80 Specifications of Error hereinbefore set forth, and for those reasons we are not requoting or arguing them separately, but we do rely upon each and every one of the said specified errors and do contend that they do constitute errors as claimed. And we particularly call the Court's attention to Specifications of Errors No. 79 and No. 80, being respectively motion for acquittal notwithstanding the verdict, and motion to a new trial, and we submit that each of these motions was good as shown by all the other previously specified errors.

Wherefore appellant prays for reversal of the judgment, with instructions to the trial court to acquit said defendant.

Respectfully submitted,

Daly B. Robnett,
Benjamin F. Kosdon,
Attorneys for Appellant.

APPENDIX.

Specification of Error No. 1.

The trial court erred in denying appellant's written motion to dismiss the indictment, filed February 3, 1947, based upon the ground that the Count I did not state a public offense; did not show any tax was due or unpaid; did not show what portion, if any, was unpaid; did not show the gross income; did not show how the filing of a victory tax return could defeat or evade the tax for 1944; did not show the basis for the alleged income claimed by the plaintiff nor what portion of the alleged income tax was victory tax, what portion was normal tax, what portion was surtax; nor who were "proper officers of the United States" from whom it was alleged information was concealed nor how defendant could be guilty of any offense by concealing or attempting to conceal "the sources" of income; that two separate offenses were set forth and not separately stated, a felony for attempting to defeat or evade under (b) of Section 145, I. R. C. joined with a misdemeanor under (a) of Section 145, I. R. C. [R. Vol. I, pp. 24-41, 74-76; Vol. IV, pp. 1627, 1637].

Specification of Error No. 2.

The Court erred in not granting the motion of appellant for a bill of particulars, which motion was filed February 3, 1947, and denied March 12, 1947, and demanded a bill of particulars as to the facts and figures showing the basis of the $36,982.52 alleged as net income and an itemization of the items, sums and figures used by plaintiff in determining said net income for the calendar year 1944 and a statement of the funds from which derived and the several amounts and various items form-

ing the same and what portion of said sum was the income from the calculation of the normal tax, what portion for surtax and what portion for victory tax; facts and figures showing the basis, figures, credits and deductions in determining the alleged tax of $18,143.12, and showing what portion thereof was normal tax, what portion was surtax, what portion was victory tax and showing the dates and amounts of credits for payments on account thereof [R. Vol. I, pp. 57-60, 74-76; Vol. IV, pp. 1627, 1638].

Specification of Error No. 3.

The Court erred in denying appellant's motion for a continuance and for a further bill of particulars on May 21, 1947, based upon the grounds enumerated in the original motion for a bill of particulars and upon the ground that neither the indictment nor the bill of particulars which had been furnished disclosed the basis of the figures or items which the Government claims were omitted from the income, nor from whence they were obtained, and the defendant, by reason thereof, was unable to proceed and prepare for defense and was therefore not ready for trial and would be taken by surprise until such bill of particulars was supplied [R. Vol. I, pp. 238, 239, 240, 242].

Specification of Error No. 23.

The Court erred in overruling the following objection to the following question pertaining to Exhibit X and in the following rulings to the following questions:

> "Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?

Mr. Robnett: I object to that on the ground that the books would be the best evidence, and it is incompetent, irrelevant and immaterial, calling for a conclusion of the witness, and nothing to show that it even went to the Acme Meat Company or that they had anything to do with it.

The Court: Let me see the exhibit.

(The document referred to was passed to the court.)

The Court: Your question is what?

(The question referred to was read by the reporter, as follows:

'Q. In your examination of the books and records of the Acme Meat Company, did they show as to what that check was used for?')

The Court: The objection is not timely, counsel. You cross-examined the witness at length upon the records, books, documents and data of the Acme Meat Company and counsel now by that examination I think you have waived any right to the objection which you have made. The objection is overruled.

The Witness: The answer is no.

Q. (By Mr. Strong): Now showing you defendant's Exhibit V, which is a check dated January 8, 1943, in the sum of $5000, paid to the order of Sam Ormont, signed Sam Ormont—it is an Acme Meat Company check—do you know whether this check was used to pay for any of the bonds purchased by the defendant Sam Ormont? A. I do not know that it was; no, sir.

Q. And again as to the books and records of the Acme Meat Company which you examined, did they show what that check was used for? A. No, sir. It just indicates that it was money drawn by S. Ormont.

Q. And showing you this document, which is Defendant's Exhibit O, a check dated 5/11/1942, issued by the Acme Meat Company for $206.11, signed by Sam Ormont, paid to Sam Ormont, do you know whether this check was used to pay for any bonds purchased by the defendant Sam Ormont during or at about that period? A. No, sir; I do not.

Q. As to the books of the Acme Meat Company, do they show that it was used in that way? A. No, sir.

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial.

The Court: As to his examination of them, you mean?

Mr. Strong: As to his examination of them.

Mr. Robnett: It is a conclusion of the witness and the books would be the best evidence. I never asked him, only from his notes as to what his notes showed as to certain things, your Honor. I don't believe it is proper for him to ask what the books show.

The Court: Counsel amended his question to say what his examination of the books showed.

Mr. Strong: That is what I meant all the time.

The Court: That is what you meant all the time?

Mr. Strong: Yes.

The Court: Whether or not he found them?

Mr. Strong: Yes, he of his own knowledge.

The Court: The objection is overruled.

Q. (By Mr. Strong): Do we have an answer? A. No, sir.

The Court: The motion to strike will be denied.

Q. (By Mr. Strong): Now I show you Government's Exhibit S, which is a check of the Acme Meat Company dated 4/26, 1943, in the sum of

$1332.27, payable to the order of S. Ormont, signed Acme Meat Company by Sam Ormont, and I ask you whether of your own knowledge you know whether this check was used to purchase any bonds by Sam Ormont or in the name of Sam Ormont? A. No, sir; I do not.

Mr. Robnett: Same objection.

The Court: Same ruling.

Q. (By Mr. Strong): Here is another check, Defendant's Exhibit AA, paid to Sam Ormont; and attached to it is a check dated 1/29/43, $100 paid to S. Ormont, signed Acme Meat Company by Sam Ormont. Do you know whether or not those checks were used to purchase any bonds in the name of Sam Ormont? A. No, sir; I do not know.

Q. And so far as your knowledge of the books and records of the Acme Meat Company, do they show that that was used for that purpose? A. No, sir; they do not." [R. Vol. III, pp. 975-978; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 25.

The Court erred in denying appellant's motion to strike the answer of witness PHOEBUS to the question regarding the conversation of May 24, 1945, with MR. ORMONT, MR. BIRCHER, MR. SCHLICK and the witness, who was a Deputy Collector, which motion and question are hereinafter set forth:

"Q. Was anything said on that occasion to Mr. Ormont regarding his rights to testify or not to testify? A. Yes, sir.

Q. By whom? A. By Mr. Bircher.

Q. Do you recall what was said? A. Yes, sir.

Q. Will you state what was said? A. Mr. Bircher first asked him if he wanted to have an attorney present.

* * * * * * * *

The Witness: I see. That was the first occasion when these announcements were made to Mr. Ormont.

He was also told that he didn't have to answer any of the questions that he didn't want to, that he was not required to answer them, and in connection with another matter he was told that anything which he said might come out later in open court in some subsequent Government proceedings.

This is my best recollection of it, or the reply to your question.

* * * * * * * *

The Court: Now in response to the first question that he was *not* entitled to an attorney, what did Mr. Ormont say?

* * * * * * * *

The Witness: Mr. Ormont said he didn't think he needed an attorney to tell the truth, that the thing had been bothering him, worrying him, and he wanted to get it off his mind so that he could go around and look people in the face again. And he repeated that he didn't think he needed an attorney to tell the truth.

Mr. Robnett: If the Court please, move to strike out that answer on the ground that it is incompetent, irrelevant and immaterial. That portion of it where he said he didn't think he needed an attorney to tell the truth might be responsive, but all the rest of it I don't think is in answer to that question. I think it is incompetent. It is improper to go into it at this time. There was no such warning that I think the

law contemplates of his rights in this matter. And as to the fact that they might use it at the time against him, he said that Mr. Bircher said in connection with some other matter, some matter. He didn't tell him as to this particular one, if I understand his answer. I don't know what the other matter was, but that is the way I got the answer to the original question."

(There is some discussion between Court and counsel and counsel asked that the prior statement as to the warning be reread and it was.)

"Mr. Robnett: Do you see what I mean, your Honor?

The Court: Yes, I do.

That is all that was said to him concerning his rights?

The Witness: I think, your Honor, before we launched into a discussion of Mr. Ormont's income tax liability, Mr. Bircher said, 'All right, then, we will go on and ask you questions and if you don't want to answer any of them just don't answer it, just say so and we will go on to the next question.'

The Court: That is all?

The Witness: Yes, sir.

Mr. Robnett: Now I urge the force of my objection, your Honor, that he wasn't warned that anything would be used against him. He is entitled to be warned as to that. Merely telling a man that he doesn't have to answer is one thing, and if you tell him if he does answer it will be used against him is another thing.

* * * * * * * *

The Court: Well, I think probably it is sufficient. It is awfully thin though.

* * * * * * * *

Q. (By Mr. Strong): Will you state what was said to Mr. Ormont and what Mr. Ormont said in reply in connection with his income for the year 1944 on the occasion to which you have just referred?

* * * * * * * *

Mr. Robnett: And may it be understood that the objection that I have made, that I have a running objection to all of this too on the grounds that I have stated?

The Court: Yes, and it will be deemed that on behalf of the defendant Ormont the objection shall have been made to each and every question concerning the conversation without repeating it." [R. Vol. III, pp. 1029-1034; Vol. IV, pp. 1627, 1638.]

The substance of the witness' testimony was that in response to a question from Mr. Bircher, Mr. Ormont stated he was sole proprietor of the Acme Meat Company to May 1, 1944, at which time he became associated with Mr. Himmelfarb. They had an oral agreement to share the legitimate profits, the first $24,000.00 of net profits to be shared equally, all amounts over legitimate net profit to go to Ormont; in addition, they had an agreement to share fifty-fifty the collections of overcharges from the operations of the Acme Meat Company. This agreement started May 1, 1944, and was discontinued May 18, 1945; that for those years their profit had been about $35,000.00 apiece. That Mr. Ormont pulled out a little memo pad or book in which was written figures, showing that between May 1, 1944, until January 5, 1945, the amount was, roughly, $12,000.00, and from January 6, 1945, to April 30, 1945, the balance was the remaining of the $35,000.00; that Mr. Bircher copied said page from said book (Exhibit 53) and the witness said there was no way for them to verify the

amounts, that no record had been kept, except writing the accumulated amounts to a given date and then throw away the old paper and retain only the current one; that the prices charged people fluctuated, there was no uniform charge per pound made for these overcharges, and that sometimes no charges were made to a customer [R. Vol. III, pp. 1035-1039].

Specification of Error No. 29.

The Court erred in overruling the following objection to any and all testimony offered by witness WILLIAM S. MALIN, who was an accountant employed by MR. MIRMAN, who was then attorney for MR. ORMONT and MR. HIMMELFARB:

> "Q. Did you at any time during the month of May 1945 meet with the defendant Sam Ormont?
>
> Mr. Robnett: As to which, your Honor, I wish to interpose an objection, and the objection requires possibly a little evidence to sustain it. It is an objection on the ground that any facts or evidence this witness might testify to are privileged. I would like to have the privilege of asking a few questions of the witness before this question is ruled upon." [R. Vol. III, p. 1091; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 30.

The Court erred in overruling the following objection to the following question asked of WILLIAM S. MALIN:

> "Q. (By Mr. Strong): Was there any discussion at that time with Ormont as to his income?
>
> Mr. Robnett: I object to that, if the Court please, as privileged, incompetent, irrelevant and immaterial; because the other defendant was present would not change the rule, I don't believe, as to privilege." [R. Vol. III, p. 1099; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 31.

The Court erred in overruling the following objection to the following question projected to WILLIAM S. MALIN:

> "Q. What did you list on Government's Exhibit 42 for identification? A. I listed—
>
> Mr. Robnett: I object to this as incompetent, irrelevant and immaterial, that the bonds and the contents of the box would be the best evidence, and it is a conclusion of the witness as to what is listed. Also it is privileged."

The witness testified that Exhibit 42 was a list of the bonds in that safe deposit box.

> (NOTE: PHOEBUS had previously testified that the box was in the names of two persons [R. Vol. III, p. 1082] and EUSTICE had testified that the list showed that the bonds were in the names of two persons [R. Vol. II, p. 727].) [R. Vol. III, p. 1105; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 32.

The Court erred in admitting Government's Exhibit 42 in evidence and overruling the following objection thereto:

> "Mr. Strong: I offer Government's Exhibit 42 for identification in evidence.
>
> Mr. Robnett: To which I object, if the Court please, on the ground it is incompetent, irrelevant and immaterial, not the best evidence, no proper foundation has been laid. The contents of the bonds themselves would be the best evidence. And this exhibit shows on its face that there are other people interested in those bonds that are listed there on that

exhibit and there is no evidence in this case to show that they were all or any of them were Mr. Ormont's bonds."

Said Exhibit was a list of bonds in the names of Sarah Goldberg, Mrs. Sue Kosdon, Dora Goldberg and Sam Ormont [R. Vol. III, pp. 1105-1106; Vol. IV, pp. 1627, 1638].

Specification of Error No. 33.

The Court erred in overruling the following objection to the admission in evidence of Government's Exhibit 51:

"Mr. Robnett: Your Honor, do I understand there are two exhibits offered, 50 and 51?

The Court: Yes.

Mr. Robnett: As to 50, I object upon the ground that it is hearsay as to Mr. Ormont; incompetent, irrelevant and immaterial; a privileged communication; and as to 51, that that is a privileged communication, and we claim the privilege. And it is incompetent, irrelevant and immaterial, and further that as to 51, pages 1 and 2 are especially privileged, and probably the last page. These three pages are privileged as to Mr. Ormont, and I want to make a separate objection upon the ground of privilege as to each part of that exhibit on pages 1, 2, 3 and 4.

* * * * * * * *

Mr. Strong: Yes. I would like to have these marked 50-A, B, C, and D.

The Court: Very well.

* * * * * * * *

Mr. Strong: May I have the same thing done with 51, to make it 51-A, B, C, and D?

The Court: So ordered.

* * * * * * * *

Mr. Katz: May it please the Court, in order that the objections heretofore interposed to the questions with respect to Exhibit 50 for identification, I would like to interpose them to 50-A, B, C and D as now constituted.

Mr. Robnett: The same would be true of our objections, your Honor.

The Court: It will be so understood. The objections are overruled." [R. Vol. III, pp. 1109, 1110, 1111, 1112; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 34.

The Court erred in overruling the objections to and admitting in evidence Exhibits 51-A and 51-B and in denying motions to strike same, as follows:

"Mr. Robnett: As to 51-A and 51-B, I object on the ground that they are confidential communications and are within the rule prohibiting their use because this witness was an agent for the attorney of Mr. Ormont at the time, and that in addition thereto they are subsequent to all charges in the indictment and do not tend to prove or disprove anything in the issues in the indictment, the indictment in this case being for the year 1944 and the years prior. These are taken long after in 1945.

* * * * * * * *

Mr. Katz: I now move to strike Exhibit 50 on the ground that there is no foundation laid for its admission, as well as on the grounds previously stated.

Mr. Robnett: I join in the objection and also make the same objection to 51-A and 51-B.

The Court: Overruled." [R. Vol. III, pp. 1114, 1116, 1117; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 35.

The Court erred in overruling the following objection to the following question:

> "Mr. Katz: If the Court please, with respect to 50-A and 50-B, I interpose the objection that there is no foundation laid, incompetent, irrelevant and immaterial, that the matters set forth therein are embraced within the privilege communication rule, and not within the issues of the case, and no corpus delicti has yet been established, also subsequent in time to the offense included within the indictment as against the defendant Himmelfarb.
>
> * * * * * * * *
>
> Q. When were those statements prepared, 51-A and 51-B and 50-A and 50-B?
>
> Mr. Robnett: I object to that on the ground it is incompetent, irrelevant and immaterial.
>
> Mr. Katz: Same objection heretofore made, if the Court please, if I may make it that way without restating it." [R. Vol. III, pp. 1113, 1115; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 36.

The Court erred in admitting in evidence Exhibit 51-C and overruled the following objection:

> "Q. (By Mr. Strong): I now show you Government's Exhibit 51-C for identification and ask you if you ever sent that to Mr. Bircher, ever mailed it to him."

This question has been previously asked and objected to and assigned herein as Error No. 36, to which objection reference is hereby made [R. Vol. III, p. 1117; Vol. IV, pp. 1627, 1638].

Specification of Error No. 37.

The Court erred in admitting in evidence Exhibit 51-C and overruling the following objection:

> "Mr. Robnett: I want to make a further objection on behalf of Mr. Ormont as to 51-C on the ground that it is incompetent, irrelevant and immaterial, and this is a privileged communication which the witness received from Mr. Ormont through Mr. Ormont's attorney, and it is therefore a privilege." [R. Vol. III, p. 1119; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 38.

The Court erred in overruling the following objection to the following question and in denying the motion to strike the answer:

> "Q. (By Mr. Strong): Showing you Government's Exhibit 51-A, which is the statement signed by Sam Ormont, where did you get the information which is contained on that document?
>
> Mr. Robnett: I object, if the Court please, upon the ground that it is incompetent and immaterial and also privileged, where he got the information; and the exhibit speaks for itself.
>
> * * * * * * * *
>
> Mr. Robnett: I move to strike the answer, if the Court please, and also to strike the exhibit itself, 51-A, upon the ground that it is now shown that all of this information was obtained by this gentleman while he was employed by the attorney for Mr. Ormont, and as agent for that attorney, and it is, therefore, privileged, and was privileged, and it is improper to admit it at this time." [R. Vol. III, p. 1119, 1120, 1121; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 39.

The Court erred in denying the following motion to strike the answer of the witness and the following objections to the following questions:

"Q. (By Mr. Strong): Where did you get the information which is inserted here: Miscellaneous Enterprises. Where did you get that information? A. From the attorney, Mr. Mirman.

Mr. Robnett: I move to strike the answer, if the Court please, upon the ground that it is not binding upon this defendant, and would be hearsay.

The Court: Overruled. Motion denied.

Mr. Katz: If the Court please, I interpose the objection, and move to strike upon the ground that it is a privileged communication. The signing of a document disclosing the information contained therein, does not waive the privilege of the source from which the information was obtained.

Mr. Robnett: I would like to join in that.

The Court: Motion denied.

Q. (By Mr. Strong): I show you this item here on the front page, item 12 on the return says, 'other income, state nature of income,' and then the words, 'miscellaneous income, $71,388.84.' Where did you get that information?

Mr. Robnett: Object to that as having been asked and answered.

Mr. Strong: No, that wasn't the same question, your Honor.

Mr. Robnett: He asked him about the item under miscellaneous income.

Mr. Strong: No, I asked about miscellaneous enterprises, which is another line on top.

Mr. Robnett: Same objection to this question as interposed to the other." [R. Vol. III, pp. 1126-1127; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 40.

The Court erred in overruling the following objections to the following questions:

"Q. (By Mr. Strong): Mr. Witness, as to these sums that are shown here of 50 per cent, $35,694.42 to Sam Ormont, 50 per cent for $35,694.42 to Phillip Himmelfarb, did you see any records with reference to those sums?

Mr. Robnett: Objected to as incompetent, irrelevant and immaterial, also that it is privileged.

The Court: The question calls for a yes or no answer, and in view of that the objection is overruled.

The Witness: Well, yes.

Q. (By Mr. Strong): Did you see regular books and records? A. No, sir.

Mr. Robnett: Object to that as asking for an opinion of the witness.

The Court: Objection sustained.

Q. (By Mr. Strong): What did you see? A. A slip of paper on which was written—

Mr. Robnett: I object to that, if the Court please, on the ground that it is privileged and incompetent, irrelevant and immaterial, also leading and suggestive.

The Court: There is no foundation laid as to when he saw it, who was present, and so forth.

Q. (By Mr. Strong): When did you see it?

Mr. Robnett: I object to that.

The Court: He said he saw a piece of paper.

Mr. Robnett: I know. I object to this question as immaterial." [R. Vol. III, pp. 1130-1131; Vol. IV, pp. 1627, 1638.]

Specification of Error No. 43.

The Court erred in permitting witness BIRCHER to testify concerning Exhibit 42 and concerning the safe deposit box and the making of a list of the contents thereof and as to the statements of Mr. ORMONT on May 25, 1945, being the same incident testified to by Mr. MALIN over objection and which is hereinbefore assigned as Error No. 31, wherein the objection is set out and to which reference is hereby made.

The substance of the witness' testimony was that Mr. ORMONT opened the safe deposit box and the witness asked Mr. MALIN to take out his work papers and copy in their presence so that they could watch him as each document was taken out of the box by either Mr. ORMONT or by the witness and that Mr. MALIN made a list as the bonds were taken out. Mr. ORMONT stated he had purchased most of the bonds, although they were recorded in his name jointly with the name of his mother, MRS. DORA GOLDBERG. He had purchased them mainly from funds from extra charges he had collected on the side which were not recorded in the books. Some of them he had purchased in earlier years with some of his savings. He noticed that one of the bonds was recorded in his name alone and not in the name of his mother and he jointly, and he asked whether it was possible for him to get it corrected so that it could be in their names jointly; although *it* was his funds, he wanted it in the two names. Said that Mr. ORMONT came over to the witness and apologized repeatedly. This answer was struck out on motion and the witness was told by Mr. STRONG not to go into the apology at all, but notwithstanding that he again stated that Mr. ORMONT said he wished to apologize for his actions the day before in having taken the affidavit

from me forcefully and doing away with it, *and asked what could be done to straighten out the situation.* The witness told him the things to do was to produce the affidavit and defendant said he couldn't. The defendant told him, "Mr. Bircher, as proof of my patriotism, I want you to know that all this extra money I got on the side I put in war bonds."

The Court also erred in denying the motion to strike said testimony where Mr. Robnett called the Court's attention to the transcript of the record and quoted certain testimony of Mr. BIRCHER with regard to what he told the defendant regarding the affidavit, and then made the following motion:

> "I now, at this time, move to strike all of the testimony of the witness Bircher, as to conversations and transactions that happened after that incident he just testified to, on the ground that thereafter anything that the defendant said or did was of necessity, said and done under threat, and not voluntary, because here he was under a threat, that he had better not do this, he was destroying Government property; it was very serious, and that they would go into that matter further at a later date. And I think it is a sufficient showing to show that the defendant thereafter would be under fear as to anything he might say or do. * * *
>
> * * * * * * * *
>
> "That is my motion, to strike all of that evidence that follows that, the conversation, and all things that happened with regard to his showing them the bonds, letting them take a list of the bonds, and also as to any furnishing of books or records thereafter, on the ground that that was and still is a threat." [R. Vol. III, pp. 1156-1158.]

Specification of Error No. 14.

The prosecuting attorney was guilty of misconduct during the examination of witness ERNEST LINK, in repeatedly eliciting from said witness prejudicial statements, after motions to strike had been made and granted, which statements were to the effect that appellant was doing a shady business and for that reason the witness did not want to continue to work for him; and the Court was guilty of misconduct in failing to promptly grant the motions to strike and in failing to instruct the prosecuting attorney to desist from further pursuing said questions and discussion between the Court and prosecuting attorney [R. Vol. I, pp. 441-446].

Specification of Error No. 15.

The prosecuting attorney was guilty of misconduct in the redict examination of Government witness ERNEST LINK, wherein the witness had made an explanation of certain checks in payment of differences on the purchase of cattle and changes which the witness had made and on the records and which the defendant had made on the original bills, so as to avoid the loss of the subsidy payments, and motion was immediately made to strike the answer and thereupon the following transpired:

"Mr. Strong: It proves that the records are false.

The Court: Government counsel's statement to the jury will be disregarded by the jury.

Mr. Strong: I was not talking to the jury.

The Court: You are speaking in the presence of the jury, counsel." [R. Vol. II, p. 504.]

Specification of Error No. 53.

The U. S. Deputy District Attorney was guilty of misconduct in his closing argument to the jury, in the following particulars:

"* * * And you will remember the cross-examination, three or four days of it, testing every iota of statement that was made by Mr. Eustice, testing him right and left, trying Mr. Eustice, did he remember or didn't he remember, where did he get it, where didn't he get it, asking hypothetical questions, if this was the fact—*nothing in the record to show that it is the fact*—but if such-and-such is the fact then you subtracted that from this, and you added this to that, what would you have? * * * *There is nothing to show that they did exist, nothing to show that any of these supposition questions are based upon anything than what they purport to be,* if and assume.

"* * * That is all on suppositions, on assumptions—*nothing in the record to show that it happened.*

"You will remember that after all that questioning and all of these checks that we used to ask him, what about this check, what about that check, did you subtract this one and did you add this one, if you did that what would you have? You will remember I took all those checks and I took each one and I said to Mr. Eustice, I said, 'Now take this check, did you include that amount in the sum which you say is unreported income?' He said, 'No, sir.' (Italics supplied. [R. Vol. IV, pp. 1456-1457.]

* * * * * * * *

"And we went down the line, and my recollection is that there wasn't a single check upon which he

had been cross-examined or questioned, *not a single check, that he included as part of the unreported income.*

"Well, if those checks aren't included as part of the unreported income, what have they to do with this case? You might just as well bring in my checks too and ask him if he deducted those sums what would he have. *It has nothing to do with this case, absolutely nothing.*

"Every single check—and you can examine these checks—some $6000 in this sum, piles of them, all marked by the defendant and all put before Mr. Eustice and cross-examined, if and maybe and assume, *but not a single one of those checks was taken as part of the unreported income.* And if that is true then there is nothing to worry about those checks, no reason to deduct those checks from the unreported income. *He didn't take them in. They had nothing to do with the figure which he says is shown to have been the additional sum of money* which was furnished by Mr. Ormont and *which was not reported.*

"And then we had this business of cross-examination of applications for war savings bonds. Any connection between the applications that were put up by defense counsel concerning which he questioned Mr. Eustice and any of the particular bonds that Mr. Eustice took in as income bought with unreported income? *No connection shown,* just an application. * * *

"Checks, figures, $1322.27. 'Add up these figures,' I asked Mr. Eustice. 'Were any of those sums taken in by you as unreported income?' He said, 'No, sir.' It has nothing to do with this case at all. More checks—more checks. [R. Vol. IV, pp. 1458-1459.]

"I ask you if those aren't some of the extra pieces in the box. We are dealing with a jigsaw puzzle, with certain evidence. I ask you to consider whether those aren't the extra pieces that have nothing to do with this case. *Very confusing, no doubt about it,* and if you don't separate them you will never get to building the jigsaw puzzle as it should be built. You will never get to the final picture. *You will have so many piece that have nothing to do with it that you may give up.* But I say to you, ladies and gentlemen, that the evidence which shows what was the unreported income is so clear and convincing and completely undisputed, completely undisputed, that there isn't any doubt as to the unreported income and there isn't even any substantial doubt as to what the sum is.

"Now what did Mr. Eustice tell you specifically? The year 1944—I am only going to deal with 1944—he told you how much the original return reported, a sum which was shown as salary, some $4500. Mr. Eustice said that he found *about $27,000 more* than Mr. Ormont had earned and hadn't reported. *Rents shown, various other deductions and items shown, unreported. What was the difference?* The difference was between the amount reported, some $9,000, and the correct amount, some $36,000.

"*I ask you, is that difference substantial?* Is that a sum that one overlooks in his computations as you might small expenditures for hairpins or something? Is that something that one doesn't take into account or is that something that someone wilfully and deliberately conceals for the purpose of defeating and evading the payment of a substantial part of his tax?

"And as to these figures which are in the record—they might not be precise but your memory is much

better than mine, I am sure—Mr. Eustice told you where he got those figures. He told you how he got them. He told you what he based them on. And there isn't any contradiction as to the figures.

"*Yes, there is an attempt to confuse, there is an attempt to drag something else in,* but as to the figures as to which he testihfied, they are all in there. There were one or two items which *Mr. Eustice took in as income which might or might not be income, which might be repayment of a loan or something.* I don't remember what the items were, but I don't think that they exceeded $2000. I don't think they even reached $1000. But the difference between $1000 which he may have taken in which he shouldn't have —I don't say he did, but if he did—*the difference that and the $26,000 or $27,000 additional,* that is immaterial. *That is just a drop in the bucket.* That is another extra piece to take your attention off the main figure. (Italics supplied.) [R. Vol. III, p. 1460.]

"I submit to you, ladies and gentlemen, that in Mr. Eustice's testimony with reference to the computations of the amounts *shown on the books and records of the Acme Meat Company* and the amounts shown upon the bank records that are undenied and undisputed as of this amount, and *that every single one of those other items dragged in have absolutely nothing to do with this because Mr. Eustice did not take them in as part of the unreported income.*

"Now I am not going to take your time to point out and show you all these if questions and assuming questions—you remember them—this thing *went on for so long that after while it was perfectly clear as to what was going on and I think it is perfectly clear as to why it was going on. And that is another thing to consider,* as I told you, because this

case deals with concealment of money, failure to report money and an attempt to defeat and evade a tax. You take into account what goes on with reference to all disclosures and everything. Are you getting complete information, or have you got just the information that Mr. Eustice put in, *undenied, undisputed and corroborated?* I will show you how. (Italics supplied.)

"Mr. Link testified. * * * But the important thing is that he testified to, and the important thing that counts in this case because it deals with this attempt to defeat and evade, it deals with the state of mind of the defendant, it shows you his wilfulness, his deliberateness, his intent and his purpose, *is the fact that Mr. Ormont told Mr. Link to change certain figures on those books, raise the figures. That is falsifying his records.* (Italics supplied.)

* * * * * * * *

"And then Mr. Link also told you that he subsequently obtained possession of some invoices, invoices which he never recorded on the books because, as he told you, he had never been given those invoices. And what did those invoices show, ladies and gentlemen? Those invoices showed on their face—and they are part of the exhibits; *you can examine them*—but they showed on their face that the money shown on them was paid, the date it was paid, and it had Mr. Ormont's signature. *That is some more money that isn't on the books, some more money unreported,* some more evidence pointing to the deliberateness and willfulness of the activities of Mr. Ormont. (Italics supplied.) [R. Vol. IV, pp. 1461-1462.]

* * * * * * * *

"The exhibits prepared and signed by the defendant himself, the defendant Ormont, if you will examine them will, on their face, tell you the whole picture, even if Mr. Eustice were not giving testimony about them; if all you had were the exhibits 51 A, B, C and D; if all you had were the income tax return for 1944; if all you had was the income tax return which shows how much money was earned in that period; those documents alone tell you what the *additional income was.* (Italics supplied.) [R. Vol. IV, p. 1468.]

* * * * * * * *

"* * * But even in the return which he filed on *that day it fails to disclose exactly what happened, because the return, if you will examine it, even there conceals the source of the money.* * * * (Italics supplied.)

* * * * * * * *

"Any deductions? *You know, you have deductions when you earn money;* * * * (Italics supplied.) [R. Vol. IV, p. 1471.]

* * * * * * * *

"* * * They disclosed at that time what that money was, and, *if everything was above board, clean, honest, and not a violation of law,* why didn't they put it on the return? Why did they have these hieroglyphics. Miscellaneous income $71,000.00. No explanation; nothing. * * * (Italics supplied.) [R. Vol. IV, pp. 1473-1474.]

* * * * * * * *

"And supposing he had the cash? Let's assume he had the cash. What did he do with it? Well, in 1943 out of the $12,000 he bought about $8000 worth of bonds. You remember that testimony, $8000 worth

of bonds. That I assume is intended to show, or at least you are supposed to draw the inference from that, that the unreported income which Mr. Eustice claims this man accumulated during that year wasn't really accumulated during that year because he bought $8000 worth of bonds.

"Take the $8000 and then look at this Schedule No. 42 which shows how many bonds were actually bought during that year and see if you don't find over $50,000 worth of bonds bought that year—$50,-000 worth of bonds—some such sum. Just look at them. They are enumerated on the schedule and it is in evidence.

"What is $8000 off of that? It is $42,000. Well, let's assume he had $8000 in cash. Does that change the story or the picture that was presented here by Mr. Eustice from these records? I submit to you that it doesn't change it a single iota, not a single iota. Any explanation as to the other money that was used to buy the bonds? No, except some checks were shown here. Which of the bonds were bought with those checks? I can't say. I don't know. [R. Vol. IV, pp. 1476-1477.]

* * * * * * * *

"* * * And besides that Mr. Malin himself, with information *which he told you he got from the defendant Ormont,* prepared net worth statements too. * * * (Italics supplied.) [R. Vol. IV, p. 1478.]

* * * * * * * *

"* * * His Honor will tell you that if we do not prove the whole figure, if we prove substantially the figure, *if we prove a substantial amount of money, it is just as good as proving the whole figure.* In other words, you don't have to hold the government

to proving precisely that sum of money which is stated in the indictment. Substantially that is enough. And the amount of money shown on that little slip of paper which I have shown you, which is Government's *Exhibit 53,* as well as the amount of money which is shown upon these documents which were filed by Mr. Ormont and the accountant, *that is practically the same as the amount shown in the indictment under count 1.* So there isn't any problem as to any variance between the amount shown and the amount that we have established. * * * (Italics supplied.)

"* * * And if you just disregard all the irrelevancies, all of these red herrings—you know what a red herring is, it is something you draw in here to distract attention—*just forget all about these things that were dragged in and that have nothing to do with this case,* and what does this case consist of? * * * (Italics supplied.) [R. Vol. IV, pp. 1480-1481.]

* * * * * * * *

"* * * If you want to forget everything that Mr. Eustice said and if you just look at that fiscal year return, which shows $71,000 miscellaneous income for the year beginning May 1, 1944, and ending on April 30, 1945, and *just take 8/12 of that amount, and you will find out how much he earned that year in addition to what he reported. You don't have to look at the books, you don't have to listen to Mr. Eustice, you don't have to listen to anybody. They show it themselves on their returns.* (Italics supplied.) [R. Vol. IV, p. 1549.]

* * * * * * * *

"* * * just because the defendant said to them he only earned $11,000, that doesn't mean that he

only earned $11,000 extra that year. All that means is that that is all he told them, but he may have earned more, and the income tax return, the fiscal year return, if you take 8/12 of that you will find that it is closer to $22,000 and not $11,000.

"But even if it is $11,000; let us take $11,000, which he admitted he earned in 1944. *That's enough.* We don't have to prove the precise figure. We just have to show *a substantial amount.*

* * * * * * * *

"* * * Do you think anybody who reports income, as Mr. Ormont did, for the year 1944, of $12,000, and leaves off $11,000, is not filing a false return? He is reportng only half, according to his story, and only one-third the amount we say was not reported. (Italics supplied.) [R. Vol. IV, pp. 1551-1552.]

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"* * * *The books speak for themselves. That is why they were admitted in evidence. If they weren't in evidence they wouldn't be in this case.* (Italics supplied.)

* * * * * * * *

"* * * Why didn't *they* put Mr. Malin on the stand to tell you about it then? He is just as accessible *to them* as he is to me. And if it is their defense, it is their *witness.* They didn't put Mr. Moody on, they didn't put Mr. Malin on." (Italics supplied.) [R. Vol. IV, pp. 1560-1561.]